This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

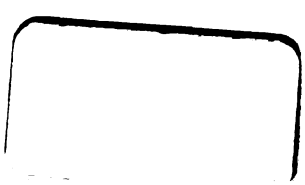
HARVARD LAW LIBRARY
3 2044 057 893 646

Digitized by Google

FACULTY

HARVARD LAW LIBRARY

Received NOV 26 1929



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CALIFORNIA LAW REVIEW

VOLUME III
1914-1915

PER
H
3
.A43x
v.3

SCHOOL OF JURISPRUDENCE
UNIVERSITY OF CALIFORNIA
BERKELEY, CALIFORNIA
1915

Digitized by Google

TABLE OF CONTENTS

ARTICLES

Anomalous Growth of the Common Law: the Anglo-American Quest for Justice, Hugh Evander Willis 103

Beginnings of the Community Property System in California and the Adoption of the Common Law, Orrin K. McMurray 359

Changing Conceptions of Law, Orrin K. McMurray 441

Chapters of the School Law of California. II. The School District William Carey Jones 195

Diligence of Directors in the Management of Corporations, M. C. Lynch 21

Eighteenth Century Recall of Judges, An 404

Experiment in Simplified Procedure, An, Proceedings before the Industrial Accident Commission, Warren H. Pillsbury 181

Freedom of Neutral Commerce, The, Edward Elliott 292

Law Reform in California, Joseph L. Lewinsohn 300

Model County Court, A, Herbert Harley 1

New Public Land Policy with Special Reference to Oil Lands, William E. Colby 269

Proposed Expert Evidence Bill, The, A. M. Kidd 216

Reorganization of State Administration in California, David P. Barrows 91

Sherman Act and the Harvester Case, The, Thomas A. Thacher 122

Some Recent Decisions Involving Federal Land Patents, William E. Colby 14

Trust Deeds and Mortgages in California, A. M. Kidd 381

What is Beneficial Use of Water? Samuel C. Weil 460

The United States and Woo Wai, David L. Levy 476

NOV 26 1929

Digitized by Google

AUTHORS

Barrows, David P.—Reorganization of State Administration in California 91
Colby, William E.—New Public Land Policy with Special Reference to Oil Lands 269
Some Recent Decisions Involving Federal Land Patents 14
Elliott, Edward—The Freedom of Neutral Commerce 292
Harley, Herbert—A Model County Court 1
Jones, William Carey—Chapters of the School Law of California, II. The School District 195
Kidd, A. M.—The Proposed Expert Evidence Bill 216
Trust Deeds and Mortgages in California 381
Levy, David L.—The United States and Woo Wai 476
Lewinsohn, Joseph L.—Law Reform in California 300
Lynch, M. C.—Diligence of Directors in the Management of Corporations 21
McMurray, Orrin K.—The Beginnings of the Community Property System in California and the Adoption of the Common Law 359
Changing Conceptions of Law and of Legal Institutions 441
Pillsbury, Warren H.—An Experiment in Simplified Procedure, Proceedings before the Industrial Accident Commission 181
Thacher, Thomas A.—The Sherman Act and the Harvester Case 122
Wiel, Samuel C.—What is Beneficial Use of Water? 460
Willis, Hugh Evander—Anomalous Growth of the Common Law—The Anglo-American Quest for Justice 103

Digitized by Google

INDEX-DIGEST

Pages Referring to Articles Designated by Asterisk

Action for Death.
See Evidence.
Admiralty.
Aeroplane not a subject of admiralty jurisdiction 143
Adverse Possession.
Property held by municipal corporation; use for ultra vires purposes 415
Aeroplanes.
See admiralty.
Agency.
Authority under general power of attorney 45
Aliens.
Right of alien to acquire land by descent under terms of treaty of 1783 with Sweden 46
Amendments.
In appellate procedure 411
(An editorial.)
Animals.
Killing of dog; action for damages 316
Measure of damages for loss of dog 231
Appeal and Error.
See Criminal Law.
Arbitration.
See Contracts.
Attachment.
Residence; foreign corporation 416
Attorney and Client.
Misconduct of atorney in paying for testimony 47
Automobiles.
See Bankruptcy, Highways.
Bank Deposits.
Joint ownership with right of survivorship 418
Bankruptcy.
Construction of exemption statutes; automobiles 49
Exemption; automobile as carriage 422
Revival of claim barred by Statute of Limitations 420
Banks and Banking.
Measure of damages for wrongful refusal to honor depositor's check 487
Bar Associations.
Far Eastern 227
Meeting of California Bar Association 134, 483
(Editorial Notes)
Bills and Notes.
See also Pleading.
Negotiability as affected by provisions designed to add security to the instrument 144
Blue Sky Legislation.
See Constitutional Law.
Book Accounts.
Open and stated accounts; Statute of Limitations 317
Burden of Proof.
See Carriers.
Carriers.
Act to regulate carriers; discriminations and preferences, connecting carriers 141
Act to regulate commerce; judicial review of orders of the Interstate Commerce Commission; liability of separately established charge for industrial switching 50
Injury to passenger; burden of proof 146
Limitation of liability for injuries to passengers 53
Child Labor.
See Master and Servant.
Code of Civil Procedure § 726
See Mortgages.
Commerce.
See also Carriers, Constitutional Law.
Freedom of neutral commerce *292
Common Law.
Anomalous growth of *103
Community Property System.
Beginnings of in California *359
Conflict of Laws.
Action for wrongful death 489
Degree of mental capacity required to change domicil 491
Guardian's bond; action upon in foreign jurisdiction 233
Injury to a foreign seaman on board a vessel while in an American port 492

Digitized by Google

Constitutional Law.
See also Waters and Water Courses.
Blue sky legislation; due process; interstate commerce 318
Commerce clause; state regulation of rates for distribution of natural gas drawn in part from other states 147
Denial by state of the right of foreign corporation to defend actions 235
Federal police power 54
Master and servant; hours of labor for women 323
Right of a state to impose a license tax upon foreign corporations; burden upon interstate commerce 321
Right of court to enjoin collection of penalties pending decision on constitutionality of the law 324
Right of state to revoke physician's license 55
Trading stamps 57

Contracts.
See also Frauds, Suretyship.
Arbitration 149
Breach on both sides may not preclude an action in equity to rescind 59
Parol evidence; interpretation by extrinsic circumstances 60

Conversion.
Evidence of ownership; prima facie evidence 327

Corporations.
See also Constitutional Law.
Diligence of directors in the management of *21

County Court.
A model *1

Criminal Law.
Duty of the court to submit the question of present insanity to special jury 61
Interstate extradition 63
Interstate extradition; fugitive from justice 236
Oysters as subjects of larceny; reservation of oyster lands 64
Public trial; right of court to exclude public from court room 328
Reversal for defect in indictment 151

Damages.
See Animals, Evidence.
Delay in delivery of telegram 494

Dedication.
Parks; change of use 66

Deed of Trust.
See Wills.

Eminent Domain.
See also Mining Law.
Liability for value of fixtures placed on land by a trespasser in subsequent condemnation proceedings 496
Unity of property; effect of separation of different parcels of land by a public highway 67

Employer's Liability.
Scope of state and federal acts 424

Equity.
See also Contracts.
Contempt; proceedings for interference in foreign jurisdiction with local receiver 69
Necessity of adequate consideration for specific permance under section 3391 California Civil Code 71

Evidence.
See also Contracts.
Confidential communications; attorney and client 497
Death by wrongful act; mitigation of damages 425
Hearsay rule; use of in proceedings before the Industrial Accident Commission 499
Impeachment by inconsistent statements; foundation rule 330
In eminent domain proceedings; admissibility of evidence to prove the value of land for particular uses 72
Judicial notice of local option election 338
Proposed expert evidence bill *216

Executors and Administrators.
Effect of judgment establishing a rejected claim 331

Exemption.
See Bankruptcy.

Extradition.
See Criminal Law.

False Imprisonment.
See Torts.

Federal Police Power.
See Constitutional Law.

Digitized by Google

Foreign Corporations.
See Attachment, Constitutional Law.
Fraud.
See also Wills.
Executory contract of sale; right of vendee to affirm contract and sue on the fraud 152
Gas Companies.
See Constitutional Law.
Gifts.
See Bank Deposits.
Guaranty.
Effect of executory agreement to guarantee 74
Guardians.
See Conflict of Laws.
Highways.
Extent of power to regulate use by automobiles 75
Hours of Labor.
See Constitutional Law.
Impeachment of Witness.
See Evidence.
Imprisonment for debt 137
Industrial Accident Commission.
Experiment in simplified procedure; proceedings before *181
Insanity.
See Criminal Law.
Insurance.
Double indemnity for injury in passenger elevator; what constitutes a pasenger elevator 240
Warranties; good faith in contracts of fidelity insurance 242
International Law.
See Commerce. Intoxicating Liquors.
Interstate Commerce.
See Constitutional Law.
Interstate Extradition.
See Criminal Law.
Intoxicating Liquors.
Statutory interpretation 154
Irrigation Districts.
See Water Law.
Joint-Ownership.
See Bank Deposits.
Judgments.
See Executors and Administrators.
Jurisdiction.
Of a court of probate in granting letters of administration 77
Justice Court Procedure.
(An editorial) 42
Juvenile Court Law.
Detention of minor for investigation 244
Labor Unions.
See Master and Servant.
Land Patents.
Some recent decisions involving federal land patents *14
Larceny.
See Criminal Law.
Last Clear Chance.
Continuing negligence 245
Law Reform.
In California *300
Legitimacy.
See Persons.
Licenses.
Exemption of public service companies from all forms of licenses; separation of state and local taxation 247
Limitation of Liability.
See also Carriers, Public Service Companies.
Of ship owners 230
Marriages.
See Persons.
Validity of marriage of minors 500
Master and Servant.
See also Constitutional Law.
Interference by third persons; lawfulness of labor unions 78
Unlawful employment of child in relation to workmen's compensation act 155
Mining Law.
Eminent Doman; public use 333
Extralateral right; apex 335
Interest of locator in unpatented mining claim; passes to heirs by descent on intestacy 502
Known lodes within placers 156
Lodes in placers; presumption arising from lapse of of time 249
Police power of state to regulate mines 159
Mortgages.
See also Trust Deeds, Unlawful Detainer.
Extinguishment by tender 336
Right to waive the provision of section 726 of the code of Civil Procedure 427
Municipal Corporations.
Operation of water system by municipality; unreasonable regulation 80
Railroad Commission; regulation of utilities 81

Digitized by Google

Municipal Ownership.
See Municipal Corporations.
Negligence.
See also Last Clear Chance.
Exceeding speed limit; negligence per se 84
Negotiable Instruments.
See Bills and Notes.
Oil Lands.
See Public Lands.
Omission in Pleading.
Defect cured by the admission of evidence 339
Nuisance.
Right of railroad to maintain coal docks 503
Parent and Child.
Is status of child determined by decree of abandonment? 505
Support of child; liability of father 340
Parks.
See Dedication.
Parol Evidence.
See also Evidence.
Parol evidence rule; incompleteness not appearing on the face of the instrument 86
Passenger Elevator.
See Insurance.
Personal Property Broker.
See Statutory Construction.
Persons.
Legitimacy; what are marriages in law under § 1387 of the California Civil Code 160
Physicians.
See Constitutional Law.
Pleading.
See also Omission in Pleading.
Promissory notes; allegation of non-payment 163
Police Power.
See Mining Law.
Power of Atorney.
See Agency.
Presumptions.
See Conversion, Mining Law.
Probate.
See Jurisdiction.
Public Land Law.
Jurisdiction of the Land department 164
Public Defender.
(An editorial) 314
Public Lands.
See also Land Patents.
A new public land policy with special reference to oil lands *269
Swamp and overflowed lands; title by listing in California 87
Public Service Companies.
See also Licenses.
Duty of a water company to extend its mains into new territory in a city 342
Limitation of liability in case of negligence 252
Valuation for rate-making purposes; going concern; pavement over mains 506
Public Use.
See Mining Law.
Railroad Commission.
See Municipal Corporations.
Recall of Judges.
An eighteenth century *404
Receivers.
See Equity.
Recital of Facts.
In Judicial Opinions 313
(An editorial.)
Riparian Rights.
See Waters and Watercourses.
Sales.
Conditional sales; loss on seller 166
School Law.
In California. II. The School District *195
Service of Summons.
By publication; sufficiency of affidavit 344
School of Jurisprudence.
Editorial Notes. [University of California.] 227, 413, 485
Sherman Act.
See Trusts and Monopolies.
Specific Performance.
See Equity.
State Administration.
Reorganization of in California *91
State of Insurrection.
Power of military under executive proclamation 167
Statutes of Limitation.
See Book Accounts, Bankruptcy.
Statutory Construction.
Validity of loan where lender fails to give the loan ticket required by statute 255
Statutory Interpretation.
See Intoxicating Liquors.
Suretyship.
Construction of contracts of a surety company 169

Digitized by Google

Swamp and Overflowed Lands.
See Public Lands.
Taxation.
See Licenses.
Tender.
See also Mortgages.
Non-production of the money 170
Testamentary Instruments.
See Wills.
Torts.
False imprisonment; liability of justice under colorable jurisdiction 171
Libel; qualified privilege 509
Trading Stamps.
See Constitutional Law.
Trial.
See also Criminal Law.
Directing verdict upon the opening statement of counsel 345
Trust Deeds.
And Mortgages in California *381
Trusts and Monopolies.
The Sherman act and harvester case *122
Ultra Vires.
See Adverse Possession.
Unlawful Detainer.
Action allowed though mortgage security 173
Warranties.
See Insurance.
Water Companies.
See Public Service Companies.
Water Law.
Irrigation districts; rights of prospective consumers 429
Waters and Watercourses.
Constitutional Law; forfeiture of riparian rights for non-user 347
Wills.
Deed of trust or testamentary instrument 256
Revocation; attempted revocation prevented by fraud or undue influence 350
Witnesses.
See Attorney and Client.
Workmen's Compensation.
See Master and Servant.

TABLE OF CASES

Adams v. Cameron 509
Alaska Tredwell Gold Mining Co. v. Alaska Gastineau Mining Co. 60
Albert Pick & Co. v. Jordan 321
Ambrose, In re 500
Anderson v. Kinnear 84
Atchison, Topeka etc Ry. Co. v. Richter 496
Barnard Realty Co. v. Nolan 249
Barrett v. State of Indiana 159
Beckett v. The City of Petaluma 415
Bias v. Reed 345
Blankenship, In re 420
Bosley v. McLaughlin 232
Boyle v. Dinsdale 418
Bracy v. Darst 318
Bright v. Offield 144
Byington v. Sacramento Valley West Side Canal Co. 429
Cadwalader v. Pye 491
Careaga v. Becker 427
Cassinella v. Allen 336
Chenoweth v. State Board of Medical Examiners 55
City of Oakland v. Pacific Coast Lumber and Mill Co. 67
City of Oakland v. Pacific Coast Lumber and Mill Co. 72
Cooper v. The Spring Valley Water Co. 327
Crawford Bros. No. 2, The 143
Crowe v. Oscar Barnett Foundry Co. 59
Des Moines Gas Co. v. City of Des Moines 506
Doughaday, Estate of 77
Employers' Assurance Corp. Ltd. v. Industrial Accident Comn. 499
Englebretson v. Industrial Accident Comn. 499
Faras v. Lower Cal. Development Co. 492
Hageman v. Puget Sound Electric Ry. 53
Hartford v. All Night and Day Bank 487
Hayes v. Hutchinson & Shields 171
Hays v. King 233
Hellier, Estate of 331
Herring-Hall-Marvin Safe Co. v. Purcell Safe Co. 149
Hillestad v. Industrial Commission of Washington 155

Digitized by Google

Hines v. Brode 152
Hughes v. City of Los Angeles 247
Inspiration Consolidated Copper Co. v. New Keystone Copper Co. 333
Interstate Commerce Commission v. Atchison, Topeka and Santa Fe Ry. Co. 50
Jennings v. Idaho Railway Light & Power Co. 416
Johnson v. Olson 46
Kennedy v. Kennedy 418
Kern Trading and Oil Co. v. Associated Pipe Line Co. 324
Lima v. Lima 344
Lukrawka v. Spring Valley Water Co. 342
McCallister v. Sappinfield 231
McDonald, Ex parte et al. In re Gillis 167
McDonough, Ex parte 497
McLaughlin v. United Railroads of San Francisco 425
McQuilkin v. Postal Tel. Cable Co. 494
Manufacturers' Light & Heat Co. v. Ott 147
Mason et al. v. Washington Butte Mining Co. 156
Mercantile Trust Co. of San Francisco v. Doe 317
Michels, In re 505
Miller v. Wilson 323
Mitchell v. Hitchman Coal Co. 78
New York Life Insurance Co. v. Daley 45
Niccolls et al. v. Niccolls et al. 256
Nourse v. City of Los Angeles 80
O'Keefe, In re 48
O'Hara v. Lynch 71
Pacific Gas & Electric Co. v. Roberts 247
Patten et al. v. Sturgeon et al. 49
Pennsylvania Co. v. United States (Interstate Commerce Commission et al., Interveners) 141
People v. Allison 151
People v. Diller 75
People v. Mueller 238
People v. Webber 330
People v. West 61
Plymouth Coal Co. v. Commonwealth of Pennsylvania 159
Poetker v. Lowry 163
Post v. Becker 427
Postlethwaite v. Minor 74
Rogers v. Rogers 340
Sabin v. Smith 316
Sanders v. Dutcher 164
Sawyer v. Osterhaus 87
School District v. Massachusetts Bonding & Insurance Co. 169
Scott v. Day-Bristol Consolidated Mining Co. 235
Sheller v. Livingston 170
Shipp, Estate of 160
Shoemaker, Matter of the application for a writ of habeas corpus 236
Silva, Estate of 350
Slaughter v. Goldberg, Bowen & Co. 339
Smith v. The Industrial Accident Commission of the State of California 424
Smith v. Northern Pac. Ry. Co. 503
Southern Trust Co. v. City of Los Angeles 247
Spokane and Inland Empire Ry. v. Whitley 489
State v. Johnson 64
State v. Johnson 328
State v. Miller 154
State v. Pitney 57
Steele v. Pacific Electric Railway Co. 146
Stewart Mining Co. v. Bourne 335
Stewart Mining Co. v. Sierra Nevada Mining Co. 335
Strain v. Superior Court of Los Angeles County 69
Thaw, Ex parte 63
Title Guarantee & Trust Co. and Miradero Water Co. v. Railroad Commission 81
Toplitz v. Standard Oil Co. 173
Townsend v. Butterfield 245
United Iron Works v. Outer Harbor Dock and Wharf Co. 86
United States v. Shauver 54
Van Dyke v. Geary 324
Wadley Southern Railway Co. v. State of Georgia 324
Wallace v. Hudson 502
Waltz v. Silviera 166
Weber v. Doust et al 244
Wessinger v. Mische 66
Wilder, In re 422
William R. Crompton Co. v. Allen 318
Willow Creek, In re 347
Wilmarth v. The Pacific Mutual Life Insurance Co. of California 240
Wolverine Brass Works v. Pacific Coast Casualty Co. of San Francisco 242
Wood v. Krepps 255
Zetler v. Tonopah and Goldfield Railroad Co. 252

Digitized by Google

BOOK REVIEWS

Aiyar, S. Srinivasa. The Legality of the Trial of Jesus 436
Baty, T. Polarized Law. Three Lectures on Conflict of Laws, Delivered at the University of London 515
Beale, Joseph Henry, Translator. Bartolus on the Conflict of Laws 265
Bouvier, John. Bouvier's Law Dictionary and Concise Encyclopedia 259
Bradbury, Harry B. Bradbury's Workmen's Compensation and State Insurance Law 261
Brown, Philip Marshall. Foreigners in Turkey, Their Judicial Status 178
Bryan, William Jennings. The People's Law 356
Chamberlayne, Charles Frederic. A Treatise of the Modern Law of Evidence. 175
Collier, William Miller. The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898 263
Corwin, Edward S. The Doctrine of Judicial Review; its Legal and Historical Basis and Other Essays 176
Eliot, Thomas D. The Juvenile Court and the Community 438
Ely, Richard T. Property and Contract in their Relations to the Distribution of Wealth 260
Emery, Lucilius A... Concerning Justice 266
Gilmore, Eugene Allen, ed. Modern American Law. A Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases 353
Glenn, Garrard. The Rights and Remedies of Creditors Respecting their Debtor's Property 516
Goodwin, Cardinal. The Establishment of State Government in California 177
Hedges, Gilbert L. Where the People Rule, or the Initiative and Referendum, Direct Primary Law and the Recall in use in the State of Oregon 59
Hodges, Henry G. The Doctrine of Intervention 517
Ilbert, Courtenay. The Mechanics of Law Making 177
Jones, F. Robertson. Digest of Workmen's Compensation and Insurance Laws in the United States 263
Kales, Albert M. Unpopular Government in the United States 264
Magee, H. W. A Treatise on the Law of National and State Banks 265
Montgomery, Charles C. Montgomery's Manual of Federal Procedure 262
Moore, Dewitt C. A Treatise on the Law of Carriers 432
Park, Orville A. Park's Annotated Code of the State of Georgia. Vol. 1. Political Code 259
Parker, Amasa J. Banking Law of New York 517
Parker, Amasa J. Insurance Law of New York 517
Richards, John E. Hon. The Illegality of the Trial of Jesus 436
Rogers, E. D. Good Will, Trade Marks and Unfair Trading 513

Digitized by Google

Rowan-Hamilton, S. O., ed. Trial of John Alexander Dickman 355
Stimson, Frederick J. Concise Law Dictionary 440
Strong, Theron G. Landmarks of a Lawyer's Lifetime 514
Taft, William Howard. The Anti-Trust Act and the Supreme Court 356
Thayer, Amos M. Jurisdiction of the Federal Courts, Revised and Annotated by Byron F. Babbitt 264
Tower, Charlemagne. Essays Political and Historical 265
Turner, G. J., ed. The Publications of the Selden Society. Vol. XXVI, Vol. VI 433
Vinogradoff, Paul. Common Sense in Law 354
Wigmore, John H. A Supplement to a Treatise on the System of Evidence in Trials at Common Law 512
Wood, William Allen. After Dinner Speeches and How to Make Them 89

Digitized by Google

Digitized by Google

California Law Review

Volume III. NOVEMBER, 1914 Number 1

A Model County Court

MORE persons have business with local courts of limited jurisdiction than with nisi prius and appellate tribunals. A considerable share of all the people never see the inside of a court of general jurisdiction except as jurors or spectators and in the life of the average citizen such occasions are rare. Allowing for the fact that one-fourth of the total population of the country is found in metropolitan districts we still have left a large majority of the people dependent upon the courts of narrow scope sitting in ordinary rural and semi-rural counties.

It is not necessary to show that these lesser and more intimate courts exert a greater influence than the more dignified tribunals by way of apology for a study of their needs. They are at least very essential. While they lie almost outside the interests of the legal profession they nevertheless involve technical features which have made political scientists shy of entering the field and this may explain the present lack of constructive proposals.

It is only another instance of "everybody's business" being slighted. Inefficiency in courts possessing narrow jurisdiction does not sting any individual very hard at any one time. It does not stir those who are strong enough to react powerfully because the privilege of appeal affords immediate relief of a sort. The people generally have only a vague ideal of efficient judicial administration and no conception of better administrative machinery. There is no complete analysis of the shortcomings of local courts and only scant reference thereto is permissible in this article. While the ordinary condition of minor courts throughout the country has not provoked a whirlwind of complaint, we must agree that it resulted long ago in general pessimism and frequently expressed contempt on the part of bar and laity alike.

The sum total of harm to the political and social fabric must

Digitized by Google

be very great. We are not yet in a fair way to estimate this harm because we have as yet no clear understanding of the affirmative value to be secured through genuine social efficiency in the people's local courts.

There is no need for treating the subject from the standpoint of any particular state. Throughout the country conditions are so nearly uniform that we can conceive of a generally prevailing form and plan a general structure to succeed it. This precludes reference to constitutional limitations. In the first stage it is desirable to ignore such limitations. Only after an ideal is established is it in order to consider whether it is preferable to alter any given constitution or to modify the scheme to avoid this difficulty.

It is plausible to hold that proposed change should endeavor to preserve as much as possible of deep-rooted form and alter externals only where this appears necessary. For instance, it is possible to propose that the office of justice of the peace be abolished outright. But it is more politic to propose only such changes in the office, if local magistrates are found consistent with the scheme, as are needed to obviate existing defects. On the other hand it may appear advantageous to find a new name for the reformed office to avoid misunderstanding and to free the new plan from existing prejudice.

Recent discussions of the administration of justice indicate that we are coming to place more emphasis on "administration". There is a growing sense that a great deal depends upon the machinery of administration and that until we shall have adapted judicial organization to modern conditions it is unfair to condemn the quality of the product or the personnel of the judiciary.

Our organization of minor tribunals reflects the needs experienced during its formative stage. In most states the environment has undergone great change while the organization is but little altered from the unrelated and rigid system suited to pioneer conditions. A far greater population must be served in the typical county than in early days. Railroad service, trolley lines, better roads, the automobile, the telephone, and rural mail delivery all contribute to make the system archaic.

Territorial distribution of population is the first factor in administration. The county, next to the state, is the significant political unit. The problem is best considered as one of unifying the limited judicial power adaptable to the average county's

Digitized by Google

needs and of providing an efficiency organization for the judges and ministerial officers to the end that controversies involving small sums may be adjudicated at a minimum of social friction and cost to litigants and to the public.

The model county court system may be secured as part of the fully developed state court system. In its entirety it is inseparable from the ideal of a co-ordinated state court system. But the growing interest in county government affords excuse for considering the local courts separately. There seems to be no reason why any single county in California could not attempt a solution of the problem with prospect of great profit.

This article will deal with the question first as a local one and having worked out a scheme from local needs will consider its relation to the ideal unified state court system.

The county court organization may well begin with the presumption that there should be in every county one judge responsible for the administration of justice in the local courts. Let him be called the county judge. His jurisdiction, if he is really to be responsible for the administration of justice within his county, must be inclusive as to subject matter. There seems to be no reason why it should not include equitable remedies. It should certainly not leave for commissioners or other magistrates such special proceedings as suits between landlord and tenant. All of the administrative work of the probate court should be included and this may be accomplished by making the county judge register in probate, or assistant to the court of general jurisdiction to which probate causes are assigned. This division would rest on the principle that uncontested probate matters are best cared for by a local judge while contested matters deserve as much experience and training as important chancery causes.

It is desired to fix the limit of county court jurisdiction at such a point that one judge will be kept reasonably busy in the county of average population. Accepting the foregoing broad view as to subject matter it appears practical to make this limit $500 alike in contract, tort, and chancery matters, but to permit of waiver of this limit by mutual agreement. In criminal causes the county court should have exclusive jurisdiction of misdemeanors and should have concurrent jurisdiction, with the consent of the accused, of all but the most important causes. If a single judge could handle all the business thus specified in a county having not more than 40,000 population there would be compara-

Digitized by Google

tively few counties in which additional judges would be required.

The reason for having local courts of limited jurisdiction arises from the fact that a cause involving only a small amount cannot stand the cost of trial at a great distance from the residence of the parties and witnesses, nor can it afford to await the sittings of a court held at long intervals. The civil causes thus found to belong naturally to the county court will fall into two classes:

(1) Those which involve sufficient sums to warrant trial at the county seat or at some other regular place for holding sessions of the county court.

(2) Those which involve less sums, or originate at points more remote from the county seat, and must be tried nearer to the homes of the parties.

The cost of removing a cause is the cost of moving the parties and all of their witnesses.

The first class of causes is easily provided for. The county court is presumed to be in session every day at the county seat, where there is a resident county court clerk. It should also be competent for the county judge to convene his court anywhere in the county and regular sittings should be scheduled in towns of sufficient importance.

It is in respect to economical and efficient trial of the lesser causes, arising in the villages and on the farms, that speculation begins. These causes are ordinarily within the jurisdiction of justices of the peace who are without training in the law, are dependent upon fees, and have a jurisdiction extremely narrow both as to territory and subject matter. The weakest feature of the system lies in the very slight administrative supervision to which justices of the peace are subjected.

In Canada the office of justice of the peace is almost wholly honorary. The J. P. has no civil jurisdiction and his activity in criminal matters is nearly obsolete. All minor civil causes are heard directly by the county judge who goes on circuit in his county and holds court at least once in sixty days in every township. The county judge is a very conspicuous official, appointed by the Dominion government, and directly in line for promotion to the provincial supreme court. The success of the system is evidenced by the fact that juries are seldom demanded in minor causes and appeals are very rare. The trial of neighborhood controversies under such a system is quiet and effective. It affords no scope to the tendency among our people to look upon

Digitized by Google

trials as an inexpensive form of theatricals.

The Canadian plan is the logical exemplification of their ideal of concentrated administrative power. A Crown judge carries into every township the dignity and power of the Provincial judicial establishment. It is a simple and effective plan and yet there are reasons for believing that it would not be the most successful plan for our people even if it were readily attainable.

A principal reason is our jealousy of power and our habit of looking upon the adjudication of minor controversies as a local function. Another objection lies in the inapplicability of the system to the enforcement of criminal law. In Ontario, for instance, the need for a judicial peace officer in every locality has developed a system of police magistrates whose work is largely supervised by the county judge.

It seems plausible to endeavor to fill the need for localized courts in the states by removing the disabilities that our justices of the peace labor under rather than by adopting outright the simple Canadian plan.

This can be done by abolishing the fee system, by giving the magistrate as much territory as he can properly handle, by providing a better form of selection and tenure, and by subjecting the office to the direct supervision of the county judge.[1] These changes are considerable, but unless the county judge is to visit every part of the county periodically, there must be a local magistracy, the members of which are nothing more nor less than an extension of the person of the county judge, accountable to him in the highest degree.

Rural population is not evenly distributed. Some single townships might afford sufficient business for a magistrate while in thinly populated sections several townships should be united to form a district. No district should be so large as to compel more than two or three hours' travel on the part of any of its residents who attend court. Bearing this need in mind it may be said that there should be as few districts in the county as can be.

According to this scheme the county will be divided arbitrarily

[1] The reader will please bear in mind that the words "supervision" and "control" as employed throughout this article are not intended to mean control of the essential juristic function. It is the author's opinion that all judges should be subject to supervision and control as to the administrative side of their respective offices but that they and the least of them should be absolutely free and independent from compulsion or influence in deciding the specific cause after formal submission.

Digitized by Google

into numbered districts of various sizes, shapes, and populations. To avoid confusion township boundaries should form the lines of the districts. Counties of average size will be likely to have from five to eight districts. In every district a local magistrate is needed who may be called the district magistrate. Few if any of the magistrates will be lawyers.

What will be the nature and extent of jurisdiction of the magistrates? What is desired virtually is to give to those magistrates who develop genuine ability a large place in adjudicating their neighbor's controversies, and to afford easy relief from the personal limitations of the less capable. It would be unfortunate to have a narrow jurisdiction fixed rigidly for there is fair presumption that the office would attract more intelligence and disinterestedness than the office of justice of the peace in traditional form. In most localities there is some worthy citizen, a natural leader, who could under an ideal tenure render a very high service through conciliatory methods and informal procedure, and he should be given large scope for developing his capacity as judge and peace maker.

A reasonable jurisdiction to confer on magistrates would seem to be as follows:

(1) All matters within the jurisdiction of justices of the peace, subject, however, to the power of the county judge to take over any cause for his personal hearing and determination. Application for such transfer can be made by either of the parties litigant, by the district magistrate, or the county judge can arbitrarily take any such cause without application.

(2) Any cause or matter within the jurisdiction of the county court assigned especially by the county judge to the district magistrate.

(3) Any cause within the jurisdiction of the county court which the parties agree shall be heard by the district magistrate.

It is believed that the foregoing provisions would center responsibility in the county judge and give him entire control of the magistracy. It would afford the elasticity which is needed in order to avail of extreme simplicity and informality as a regular thing and at the same time permit of avoiding this primitive simplicity in special cases by those who have reason to fear its consequences.

Digitized by Google

Informality flies out of the window when a jury enters. Where there are no juries there seldom are lawyers. Where there are no lawyers there is opportunity for conciliation. The bar has no occasion for jealousy in this matter because these little cases, tried away from the county seat, cannot afford fair remuneration. So it might be well to forbid the use of a jury by the district magistrate. This would make for jury waivers in most causes begun in a district presided over by a responsible, fair minded magistrate. The result would be the minimum of friction and expense. Where the jury was demanded the case would have to be heard by the county judge at a place to be determined by him. The county judge and magistrate between them would be able to put a timely curb on the disposition toward wanton extravagance which seizes the average litigant during the period between service and return day. If procedural reform is ever to be effectual it must be built upon the fundamentals of human nature.

We are prepared now to consider the ideal method of filling the offices. The county judge can be elected or appointed. There is no question that appointment by a conspicuous, responsible authority would result in a capable judiciary. But "responsible" should mean responsible for the due administration of justice, and this definition excludes governors. There would also be as many of these local judicial officers, and their aggregate power and influence would be so considerable, that it would not be wise to increase a governor's patronage to this extent.

The faults urged against election in the case of circuit judges do not apply equally to the office of county judge. The county is a wieldy district within short ballot principles. The people are well acquainted with the bar of their county. All around efficiency is most sought in this office and the electorate will pass on this indefinable quality with fair success. A lawyer cannot conceal his personality long. The voters will have a fair knowledge of the relative fitness of candidates. The office conforms to the second short ballot principle by being a conspicuous office, far more conspicuous in fact than any office now voted for in the average county. It would seem that we need only to consider what improvements, if any, can be made upon ordinary election methods.

As there can never be any large number of candidates a place on the nominating ticket should be made easy. A positive reason

Digitized by Google

for doing so lies in the need for making the eligibility test as broad as possible. No lawyer otherwise available for the position should be barred by reason of adherence to some theory of political economy alien to the judicial office. This implies a non-partisan ballot for the primary and the election. In states in which it is customary to hold judicial elections separately the plan should be adhered to in electing county judges. In other states a separate non-partisan judicial ballot should be employed.

Periodic elections and short terms have obvious faults. No matter how satisfactory the services of a judge may be he is required to run the gauntlet every four or six years. If he were merely required to submit to the electors the conduct of his office at periodic elections, so that they could exercise the option of declaring the office vacant, there would be sense in the system. But this is not the case. The people cannot pass upon the judge's record as a single unqualified issue. A motive for undermining his position and embarrassing him in the administration of his duties is furnished to all possible seekers after his office. The incumbent is then required to run against the field. This is one of the most forceful arguments against the judicial recall in its present form, and it applies almost equally to the ordinary form of election.

Let the people have a right to declare whether the incumbent shall continue in office. Let them also name his successor if there is to be a change. But our attempt to economize effort by obliging the voters to perform both of these functions through a single ballot merely results in confusion and injustice.

The elective principle will be at its best when the name of the incumbent is submitted to the voters with the simple question—shall he be continued in office? with spaces for checking the words "yes" or "no". The first term served by a judge should be considered a probationary period and so should be not longer than four years. If continued in office after this test the judge should not be required to run the gauntlet again for a period of eight years. A second confirmation should entitle him to another eight year term.

If a majority of the votes are in the negative the office should be declared vacant and the defeated judge should be ineligible to be a candidate for the office for the ensuing year. The vacancy can be filled through a special election or by an *ad interim* appointment. Appointment in such form would be free from the objec-

Digitized by Google

tions commonly ascribed to it for the appointing power would endeavor to anticipate the voters' wishes. A lawyer who had no reason to expect popular support would not be keen to accept appointment for a few months even if tendered him.

The foregoing plan would require the judge to "run against his own record", not against candidates actuated by selfish motives. It is reasonable to suppose that there would be a longer average tenure of office and greater freedom from political ties.

The situation is different with respect to the office of district magistrate. There are in every community men well qualified for public service who may accept a tendered office but who will not actively seek office. Election is not the ideal method of selecting magistrates. The irregular district is not adapted to the elective plan. Expert selection is needed and the office should seek the man.

The magistrates are but deputies of the county judge—extensions of his own person, in a manner—and he must control them thoroughly and be responsible absolutely for them. It would be proper then to permit the county judge to select the magistrates but this would lay the judge open to a vast deal of importuning which he should be spared if possible. A way out of the difficulty is to have the magistrates selected by the county board or commission with the approval of the county judge. Under this plan the county judge can at least prevent the selection of the unfit and can escape most of the solicitation of the office-hungry.

Control of the magistrates can be centered in the county judge by providing that the latter may remove them at any time for reasons assigned. This would prevent wholesale removals when there is a change in the office of county judge. The contingency is not so much to be feared because a new county judge would be loath to remove experienced magistrates and become dependent upon raw recruits. If the entire state judiciary is organized it is appropriate to provide that the chief justice of the state must endorse an order of removal.

Thus far we have considered the machinery of the county court with reference only to civil jurisdiction. It will be found admirably suited to the administration of criminal law. Criminal causes have a tendency to concentrate at the county seat because usually there is no lockup elsewhere in the county. District magistrates would have power to issue warrants and conduct preliminary examinations in the same manner as is now commonly

Digitized by Google

done by justices of the peace. They may also be permitted to hear and determine charges involving penalties not exceeding a certain amount, reserving the more important matters for the county judge. If, as previously suggested, the magistrate is not permitted to preside over a jury, there would be a strong motive for waiver of jury trial as a saving of time and money on the part of the accused. The right to have a jury is a grand thing. Its exercise in every trifling cause would entirely block the wheels of justice.

The county judge should be permitted by rule to take over for trial before himself every criminal matter triable by a magistrate. This would make for uniformity of law enforcement throughout the county and would enable the magistrate to transfer the responsibility in certain embarrassing prosecutions to more capable shoulders.

As to the limit of criminal jurisdiction reposed in the county court, it would probably be most expedient to retain the dividing line between felonies and misdemeanors, but to permit trial of all but the most serious felonies by the county judge with the consent of the accused. Nearly all those charged with serious offenses would then have the option of being tried by the county judge or of being held for trial at the next term of the court of general jurisdiction.

It might be found desirable to empanel a jury in county court regularly once a month. In a few days all jury trials would be disposed of. This would be a great improvement over the custom of utilizing locally the special venire which is wont to bring semi-professional jurors into most cases.

We have now a rough sketch of a county court which fixes responsibility on a conspicuous popular official and provides him with a corps of local assistants subject to his guidance. It is timely to consider the relationship of such a court to a thoroughly organized state court system.

It must be presumed that the system is made up of three general judicial departments, namely, the court of appeal, the nisi prius court, and the county courts. It must be presumed that the entire system will be governed by a council of judges possessing large powers for judicial administration and with respect to creating and amending rules of procedure; also that there will be a chief justice of the state who will be the executive head of the entire establishment.

Digitized by Google

There will be in the average state a small proportion of counties too populous to get along with a single county judge. There is experience warranting the belief that with a civil jurisdiction extending to $500 a county judge can serve a population of 40,000. In more populous counties up to 70,000 there should be an associate county judge, like the county judge in all respects save that he shall be subject to administrative control by the latter, and for every 30,000 population over 70,000 there should be an additional county judge. In most states there would be only a few such larger counties and they could be provided for individually.

A county judge who has an associate could assign supervision of the districts to his assistant, trying the more important causes himself at the county seat; or the two might specialize severally in civil and criminal matters. The division of work should not rest upon any general rule but wholly upon the discretion of the county judge.

With two associate judges further specialization is possible. One might have sole charge of the probate department, of juvenile offenders, and the domestic relations branch, thus affording smaller urban districts the same benefits which large cities may enjoy, and which cannot readily be secured under the existing organization, or lack of it.

Consider now the rare county of really large population. One having 325,000 people would have a county judge and ten associate judges (unless in actual experience this number should be found too large or too small). Specialization on such branches as police court, juvenile, domestic relations, civil jury, criminal jury, civil non-jury, attachment and replevin, outlying districts, and so forth, would naturally come about, and the county judge, as head of the entire court, would be an officer with power commensurate with the large responsibilities involved.

Whether this disposal of the large city problem would be best cannot be told without much experience. The alternative is to consider a division between nisi prius and limited jurisdiction unnecessary in any county in which there is enough business to keep several judges constantly occupied. The result of having only one class of judge in such a county permits of a more thorough organization of the judicial machinery than has been proposed for the typical county court.[2] The two plans will have

[2] For a study of the court organization specially adapted to the large city see the following publications of the American Judicature

Digitized by Google

to be tried out before their relative merits can be gauged. An objection to the employment of the county court plan in a large city arises from the fact that the district ceases to be wieldy as an election unit and the office ceases to be conspicuous where there are more than two or three associate judges to be elected.

A principal point of contact between the county court division and the rest of the state judicial establishment arises from the duty of the chief justice to collect and publish full statistics of all divisions and branches of the state court system. The district magistrates will be required to report their business to the county judge as frequently as once a month and the county judge will be required to report for the county not less often to the chief justice.

In most of the states it would probably be preferable to permit the chief justice to delegate his control over county courts to a judicial officer known as presiding justice of the county courts. If the administration of justice in the local courts is to be brought to a highly efficient plane the work of supervision merits the undivided attention of one properly qualified official. Given such a presiding justice it may be presumed that he will spend much of his time in the field, traveling from county to county, encouraging uniformity of practice, and checking or stimulating county judges according to their individual needs.

There are other points of contact. The jurisdiction of the county court civilly should be concurrent with the jurisdiction of the nisi prius branch. Abuse of the right to begin causes involving small amounts in the higher court is readily prevented by rules concerning costs, as is done in Canada. The plaintiff who does not recover more than $500 may be required not only to forfeit costs, but to pay costs, at the discretion of the court, to the defeated defendant. The flexibility thus secured will be appreciated by the litigant who believes, whether for cause or not, that the local judge is prejudiced.

A close union of the local and general courts may also be effected through making the county judge *ex officio* master for his county of the circuit court. This dignifies his position and makes the business of the higher court more continuous in the most remote parts of the state.

Society: Bulletins II and IV. Bulletin VI is the first draft of an act to establish a state-wide system of courts, including local courts. Copies may be had free on application to the author.

Digitized by Google

On the ministerial side there is also close relationship because the clerk of the county court will be the local deputy of the clerk of the entire state court. The actual compilation of statistics will be done by the clerks on behalf of the judges.

Here the game of make-believe must stop. The simple form and close co-ordination here suggested may never be worked out. But no very considerable change is needed to produce self-conscious courts from which a high order of attainment may naturally be projected. It is a problem of administration, of political science, rather than of law. No change in substantive law, no change in individual or collective rights, is proposed.

One who holds inflexibly to an ideal of government of laws and not of men must presume a co-ordinated system of courts to serve as the material medium for an expression of the law's ideal. One who thinks of the law as the popular will must presume a system at once responsible and responsive. At the present time our machinery of justice is not closely co-ordinated, nor is there conspicuous responsibility, nor any possible responsiveness to any definite ideal of justice or administration. This is especially true of the decentralized and disconnected local courts. No interest has anything to fear from improvement in the machinery of justice. On the contrary all interests can find in such a proposal a genuine advance toward the goal of government.

Herbert Harley.

Secretary, American Judicature Society, 29 S. La Salle St., Chicago, Illinois.

Digitized by Google

Some Recent Decisions Involving Federal Land Patents

ATTEMPTS are being made constantly to break down the force and effect of patents issued by the United States for its public lands. The courts have quite consistently refused to encourage these attacks and have gradually by a long line of decisions fortified the conclusive effect of the government's conveyances, until land patents issued by the United States have become clothed with a dignity and character which render them immune from most of these attempts to destroy their integrity.[1]

The tendency of the courts is to further strengthen the effect of patents rather than to relax. This subject has recently assumed greater interest than usual because of several decisions which have just been rendered by the Supreme Court of the United States and by the Circuit Court of Appeals bearing on this subject. Most of these cases were suits brought by the government itself to have its own patents set aside and were the outcome of the more rigorous surveillance on the part of the government in parting with title to its public lands in pursuance of the conservation policy which has recently taken such firm root.

Probably the most important case of this character which has arisen in many years is what is commonly known as the Burke case.[2] This case arose in the oil fields of California and was an attempt on the part of Burke and others to assert rights claimed to have arisen by virtue of placer mining locations made on valu-

[1] St. Louis Smelting Co. v. Hemp (1881), 104 U. S. 636, 26 L. Ed. 875; Steel v. St. Louis Smelting Co. (1882), 106 U. S. 447, 27 L. Ed. 226, 1 Sup. Ct. Rep. 389; Maxwell Land-Grant Case (1886), 121 U. S. 325, 30 L. Ed. 949, 7 Sup. Ct. Rep. 1015; Barden v. Northern Pac. R. R. Co. (1894), 154 U. S. 288, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1030; Shaw v. Kellogg (1898), 170 U. S. 312, 42 L. Ed. 1050, 18 Sup. Ct. Rep. 415, are leading cases which illustrate this development.

[2] Burke v. So. Pac. R. R. Co. (June 22, 1914), 234 U. S. 669, 34 Sup. Ct. Rep. 907. The decision in the trial court is not reported, but demurrers were sustained and a decree entered dismissing the bills, for reasons assigned in an opinion announced the same day in Roberts v. So. Pac. R. R. Co., 186 Fed. 934.

Digitized by Google

able oil lands previously patented to the railroad company under its land grant. While only five sections of land were involved, this was a test case and the determination of the questions presented directly affected similar lands patented to the railroad company having a value that was commonly reported to be over half a billion of dollars. The suit, though brought by private individuals, raised several important questions in which the government was vitally interested by reason of the fact that it was contemplating bringing direct proceedings for the annullment of similar railroad patents, and hence it was ably represented by counsel detailed from the federal Department of Justice. The case was appealed to the Circuit Court of Appeals (Ninth Circuit) but this court, in view of the gravity of the problems and the magnitude of the interests involved, certified the case to the Supreme Court of the United States for instruction upon designated questions of law.[3]

The questions propounded in the certificate were as follows:[4]

1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10th, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant, but excluded from it, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregu-

---

[3] This procedure is authorized by § 239 cf the Federal Judicial Code (36 Stat. at L. 1157).

[4] In order to secure the advantage of juxtaposition, the specific answers made by the Supreme Court to each of these certified questions is inserted after each respective question.

Digitized by Google

larly issued, undoubtedly so; but, as it is the act of a legally constituted tribunal, and is done within its jurisdiction, it is not void, and therefore passes the title (Noble v. Union River Logging R. Co. (1892), 147 U. S. 165, 174, 175, 37 L. Ed. 123, 126, 127, 13 Sup. Ct. Rep. 271), subject to the right of the government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued (McLaughlin v. United States (1882), 107 U. S. 526, 27 L. Ed. 621, 2 Sup. Ct. Rep. 862; Western Pac. R. R. Co. v. United States (1882), 108 U. S. 510, 27 L. Ed. 806, 2 Sup. Ct. Rep. 802).

3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.

4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.

5. Is petroleum or mineral oil within the meaning of the term "mineral", as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.

6. Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.

7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading & Oil Company, estopped to deny the validity of said clause?

Digitized by Google

> Answer.—No; such an agreement is of no greater force as an estoppel than the exception in the patent. The latter being void, the patent passes the title and is not open to collateral attack, or to attack by strangers whose only claim was initiated after the issue of the patent.

The Supreme Court in its opinion written by Justice Van Devanter[5] first disposed of the fifth question, holding that petroleum in its ordinary and popular sense was a mineral and that Congress in excluding "mineral lands" from the operation of the railroad granting act, was "dealing with a practical subject in a practical way" and "doubtless the ordinary or popular signification of that term was intended".

The court then proceeded to discuss collectively several of the other questions involved, deciding that the railroad granting act expressly provided for the issue of patents to the lands granted; that this function was confided to the Land Department under the general law in force and therefore, it devolved upon the department to identify the lands to be patented, as obviously the lands expressly excluded by the terms of the grant were not to be so patented; that it necessarily followed that the power and duty of determining in every instance whether or not the land was subject to patent, rested with the department; that the mineral exclusion clause is not peculiar to railroad lands, but appears in the homestead, desert-land, timber and stone, and other public-land laws and in each instance the character of the land is a question for the Land Department just as are the qualifications of the applicant and his performance of the acts prerequisite to the patent's issuance; that a railroad patent when once issued has all the force and effect of patents issued under these other public-land laws and upon collateral attack it affords "conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, anl upon a direct attack. . . [it affords] . . such presumptive evidence thereof as to require plain and convincing proof to overcome it."

The court then took up the question of the validity of the clause inserted in the patents by the Land Department as a precautionary measure, viz: "excluding and excepting from the trans-

---

[5] 234 U. S. 669, at p. 676, 34 Sup. Ct. Rep. 907, at p. 910.

Digitized by Google

fer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent". It was insisted by those opposing the railroad title that this clause indicated that the Land Department did not consider and determine whether the lands were mineral or not and that even lands discovered to be mineral after the issuance of patent should be excepted from its operation. The court, however, called attention to the fact that the circulars, procedure and decisions of the Land Department all indicated that it "regarded the issuing of such a patent as a determination of the non-mineral character of the land, and as effectually and unconditionally passing the title" and that the excepting clause had been expressly held by the Secretary of the Interior "as without any warrant in law and void".[6] Several decisions of the courts holding invalid similar attempts on the part of the land department to qualify various kinds of patents to public lands were cited and the conclusion reached that these decisions established a rule of property which had become impregnable.

The contention that Congress had placed the grant under consideration in a distinct category by providing in a special resolution enacted later that all the odd-numbered sections within the primary limits of the grant should be patented, and that it was contemplated that this should be done without any inquiry as to their occupancy or mineral character, was also held to be unfounded, since Congress could not have intended that the company should receive patents for lands within the primary or place limits and also for additional lieu lands within the indemnity limits. And the more reasonable view was to give effect to those excepting clauses contained in the granting act in a normal and rational way "by patenting to the company no lands occupied by actual settlers or otherwise excluded or excepted from the grant". The fact that the railroad company had accepted patents containing the void excepting clause was urged as a sort of estoppel on the railroad having the effect of preventing it from denying the validity of the exception. The court held, however, that as the patentee had no voice in the matter and the land department was not authorized to insert the exception, the point was not well taken.

That the findings of the land officers in issuing patents are not, however, conclusive upon direct attack by the government and

---

[6] Re Northern Pac. R. R. Co., 32 Land Dec. 342.

Digitized by Google

that patent application proceedings are not adversary in any true sense as far as the government is concerned is a well established proposition recently re-affirmed.[7] While the questions of fact essential to the issuance of patents are committed to the land officers for determination, yet it is possible in *ex parte* proceedings to impose on these officers and by fraudulent proofs secure entries and patents of a nature that the true character of the land does not justify. Such patents are voidable and may be annulled in a direct suit brought by the government against the patentee or a purchaser with notice of the fraud.[8] The issuance of the patent is treated as being in the nature of a judgment *in rem*,[9] and the action of the land officers in issuing the patent, as being presumptively correct[10] and in attacking the patent the government carries "the burden of proving the fraud by that class of evidence which commands respect, and that amount of it which produces conviction".[11]

A final question arises as to the length of time within which suit to cancel a patent may be instituted by the government.

The Act of Congress, approved March 3, 1891[12] provides that suits by the United States to vacate and annul patents thereafter issued must be brought within six years of the date of the issuance of the patent.[13] The effect of this statute is to validate patents outstanding for six years which might clearly have been set aside on direct attack because of some vital defect in the antecedent proceedings which culminated in the issuance of the patent. The statute presupposes an instrument which might be

---

[7] Washington Securities Co. v. United States (May 25, 1914), 234 U. S. 76, 79, 34 Sup. Ct. Rep. 725, 726.

[8] Diamond Coal and Coke Co. v. United States (April 6, 1914), 233 U. S. 236, 34 Sup. Ct. Rep. 506. One who has acquired such a right to the land as to entitle him to that form of equitable relief, may also bring a suit to have the patentee declared a trustee, Burke v. So. Pac. R. R. Co. (June 22, 1914), 234 U. S. 669, 676, 34 Sup. Ct. Rep. 907, 910.

[9] El Paso Brick Co. v. McKnight (April 6, 1914), 233 U. S. 250, 258-260, 34 Sup. Ct. Rep. 498, 501-502. See also note to Hartman v. Warren (1896), 76 Fed. 157, 22 C. C. A. 30.

[10] Mason v. Washington Butte Mining Co. (May 4, 1914), 214 Fed. 32, 34.

[11] Washington Securities Co. v. United States (May 25, 1914), 234 U. S. 76, 34 Sup. Ct. Rep. 725; Diamond Coal and Coke Co. (April 6, 1914), 233 U. S. 236, 34 Sup. Ct. Rep. 506; Connor v. United States (May 4, 1914), 214 Fed. 522, 529.

[12] 26 Stat. at L. 1093, § 8.

[13] Burke v. So. Pac. R. R. Co. (June 22, 1914), 234 U. S. 669, 693, 34 Sup. Ct. Rep. 907, 917.

Digitized by Google

declared void, for if its operation were confined to valid patents it would be meaningless.[14] After the statute has run the patent is to have the same effect against the United States that it would have had if it had been valid in the first instance.

Whether or not, in the case of patents where concealed fraud exists, the statute begins to run until the discovery of the fraud is a question upon which there is a marked difference of judicial opinion. Some of the trial federal courts have held that the statute is all-embracing and that suits of every nature including those involving fraud come within its purview,[15] while the Circuit Court of Appeals has held that the element of concealed fraud tolls the statute until the discovery of the fraud by the United States.[16] The present weight of authority is naturally represented by these latter holdings, though the question will not be placed at rest until the Supreme Court of the United States has spoken the final word.[17]

William E. Colby.

San Francisco, California.

---

[14] United States v. Chandler-Dunbar Co. (1907), 209 U. S. 447, 450, 52 L. Ed. 881, 884, 28 Sup. Ct. Rep. 579, 580.

[15] United States v. Smith & Werner (1910), 181 Fed. 545, 554; United States v. Exploration Co. (1911), 190 Fed. 405, 406.

[16] United States v. Lee Wilson & Co. (Feb. 20, 1914), 214 Fed. 630, 649-650; Linn & Lane Timber Co. v. United States (1912), 196 Fed. 593, 599; United States v. Exploration Co. (1913), 203 Fed. 387; Moses v. Long Bell Lumber Co. (1913), 206 Fed. 51.

[17] There are cases now pending which will probably bring this question flatly before the Supreme Court of the United States for decision.

Digitized by Google

Diligence of Directors in the Management of Corporations

"MODERN text writers, neither English nor American, agree on the relation which the officers and directors bear either to the shareholders or the corporation itself, nor do the courts any more nearly agree than the text-writers. This is due, in great measure, to the fact that the common law rules of responsibility which would govern principal and agent, or trustee and cestui que trust, have been so modified by statute that the question has now become simply one of statutory construction, and application."[1]

Although it is felt that this conclusion that the relation of the directors to the stockholders and the corporation is now merely a question of statutory construction, is an extreme view of the situation, it must be admitted that legislative enactments now play a very prominent part in the final determination of such a question. Modern business conditions during the years since 1896 have brought the question of the responsibility of directors for abuses of their powers, violations of their duties, and their liability for their conduct and acts either of omission or commission squarely before the public for serious attention.[2]

In that time many new statutes have been passed, old statutes have been revived, and the common law rules have been relied upon in an attempt to define clearly the duties of directors in managing the affairs of the corporation for the benefit of the stockholders and the creditors. The cases, although they have not been in accord as to the extent of liability of directors, have always deemed that there was a common law duty upon such officers of corporations.[3]

An early case which recognized that liability was the case of The Charitable Corporation v. Sutton.[4] There the status of a director was announced as follows:

---

[1] (1913), 47 Am. Law Rev. 561, 563.
[2] See 26 Harv. Law Rev. 467, (1913).
[3] Thompson on Corporations, § 1265.
[4] (1742), 2 Atk. 400, 405, 26 Eng. Repr. 642.

Digitized by Google

"I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the Crown.

"But it cannot be said to be an employment affecting the public government, ...

"Therefore committee-men are most properly agents to those who employ them in this trust and who empower them to direct and superintend the affairs of the corporation.

"In this respect they may be guilty of acts of commission or omission, of mal-feasance or non-feasance. *Vide Domat's Civil Law* upon this head, *2 B. Tit. 3, Sec. 1 & 2.*"

Having recognized this duty and obligation, the courts were at once thrust into the difficult situation of defining its limits and applying it to particular cases. This article will not deal with the development of this rule in its application to acts of commission or malfeasance but the discussion will be confined to cases of omission or nonfeasance.

On this point the court in the case of The Charitable Corporation v. Sutton, *supra,* continued:

"To instance in non-attendance; if some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others.

"By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely *honorary;* and therefore they are within the case of common trustees. *Vide Coggs v. Barnard,* 1 *Salk.* 26.

"Another objection has been made, that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of this court.

"Now if this doctrine should prevail, it is indeed *laying the axe to the root of the tree.*"

It is worthy of note here that this early authority referred to the director as an agent and also as a trustee. Courts have continued to do the same thing down to the present day and have never been able to say whether a director's duty should be judged by that of an agent or by that of a trustee. This is not the fault of the courts but is due in large measure to the fact that a director in some situations stands in the relation of agent to principal and in others in the relation of trustee to cestui. He has characteristics

Digitized by Google

common to both but often stands in a position differing from either. Agents usually receive a direct consideration or compensation for their services while directors usually do not. Trustees have no interest in the subject matter of the trust while directors usually have a very substantial interest as stockholders in the property of the corporation. For this reason the problem cannot be solved by relying entirely upon analogies as the courts seem inclined to do but must be worked out upon a somewhat independent basis.

The earliest case which is recognized as a leading authority on this subject in the United States is Spering's Appeal.[5] It was said in that case:

> "These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body."

This statement of the rule met with a direct response in the case of Hun v. Cary.[6] Referring to the above quotation that court said:

> "As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise ordinary care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them . . . . One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties."

In another portion of the same opinion, referring to the statement that a director is liable only for gross negligence, this same court said:

---

[5] (1872), 71 Pa. St. 11, 24.
[6] (1880), 82 N. Y. 65, 73.

Digitized by Google

"If gross negligence be taken according to its ordinary meaning as something nearly approaching fraud or bad faith I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

"It seems to me that it would be a monstrous proposition to hold that trustees intrusted with the management of the property, interests and business of other people who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case."

The third case which is looked upon as a leading authority in this country is the case of Briggs v. Spaulding, decided by the Supreme Court of the United States.[7] In that case the court was divided five to four. The facts showed that the directors for fourteen years prior to the failure of the bank had allowed the business to be conducted by the president. The directors were not charged with misappropriation or misapplication, or interference with any property of the bank but with the omission of duty which, if performed, would have prevented certain specific losses with which the receiver of the corporation sought to charge them. The majority of the court decided that under the facts of the case the defendant directors were not liable.

The conclusion of the court was as follows:

. . . "we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors . . . ."

Mr. Justice Harlan delivered a vigorous dissenting opinion on behalf of the minority of the court. In referring to the contention of the defendants that they were justified in allowing the

[7] (1890), 141 U. S. 132, 165, 35 L. Ed. 662, 11 Sup. Ct. Rep. 924.

Digitized by Google

president to conduct the affairs of the bank and in taking his word for the status of the concern, he made the following comment:

> "Upon [the defendant's] theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong."

Referring to the degree of diligence and the extent of supervision to be exercised by the directors, the minority opinion further declared:

> "It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge."

The doctrine that directors should be liable for gross negligence only does not seem to receive sympathetic support in the popular mind nor in the general declarations of the courts. They should be held responsible for the amount of diligence and care required in the particular office. This rule has been well stated by a well known text writer[8] as follows:

> "What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."

Confusion is added to the problem at this point by the fact that too much emphasis is usually put upon the distinction between mere ministerial acts and those acts requiring an exercise of discretion by the directors. It is true that when directors exercise their judgment concerning matters of policy they are usually not liable for resulting losses.[9] This does not mean, however, that they may not have been careless in exercising their discretion.

---

[8] Morawetz Corporations, § 552; Camden v. Virginia Safe Deposit and Trust Co. (Va., 1913), 78 S. E. 596.

[9] Excelsior W. & M. Co. v. Pierce (1891), 90 Cal. 131, 145, 27 Pac. 69; Pollitz v. Wabash Ry. Co. (1912), 207 N. Y. 113, 100 N. E. 721; Thompson on Corporations, § 1270.

Digitized by Google

Neglect of duty by directors in discretionary as well as in ministerial acts should make them liable to those who are injured by such omissions.

There are other cases which throw sufficient light upon the rules above stated to be of value here. In the case of Swentzel v. Penn Bank[10] the court pointed out that there was a popular misapprehension as to the duty of directors in administering the affairs of a corporation and continued:

> "In the popular mind they are held to the rule that they ought to take the same care of the affairs of a bank that they do of their own private business."

That, undoubtedly, was the view of the court in Hun. v. Cary, *supra,* but is decidedly not the view in the other cases above cited. The court in Swentzel v. Penn Bank then announced what it considered to be the rule of law:

> "It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatary. A business-man generally understands the details of his own business but a bank director cannot grasp the details of a large bank without devoting all of his time to it to the utter neglect of his other affairs."

These authorities summarize the views that have prevailed and still prevail in this country as to the extent of the liability of directors. Particular courts have varied in their attitude of loose or strict application of these various doctrines. The case of Gibbons v. Anderson[11] presents a state of facts where the directors of a bank absolutely neglected their duty toward the corporation, delivered over its entire management to a single director in the capacity of cashier and president, and took no trouble to familiarize themselves in any way with the business of the bank. The records of the directors showed but few entries and they were almost wholly limited to the election of directors or to the declaration of dividends. The court was clearly of the opinion that directors in this case were liable and distinguished it from Briggs v. Spaulding, *supra,* upon the facts of the cases:

---

[10] (1892), 147 Pa. St. 140, 23 Atl. 405, 415.

[11] (1897), 80 Fed. 345, 349. See also Dovey v. Cory, L. R. [1901] App. Cases 477; Cavanaugh v. Gould (N. Y., 1911), 147 App. Div. 281, 131 N. Y. Sup. 1059; McKinnon v. Morse (1910), 177 Fed. 576; Rankin v. Cooper (1907), 149 Fed. 1010; Warner v. Penoyer (1898), 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; Yates v. Jones' National Bank (1910), 206 U. S. 158, 51 L. Ed. 1002, 27 Sup. Ct. Rep. 638.

Digitized by Google

> "It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, ... The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely."

There is another view suggested in the authorities to the effect that the directors, being stockholders, have sufficient personal interest in the affairs of a corporation to perform any duties that may devolve upon them in the course of their administration.

> "It is to be remembered that they have the same interests to protect and subserve as other stockholders, and self-interest naturally prompts them to look after their own, and the degree of care they are bound to exercise is that which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment. . . ."[12]

Keeping in mind ordinary business practices it is easy to realize that this view is better in theory than in application. Its principal defect is to be found in the custom of electing dummy directors so that the interests of the majority electing them is often subserved to the detriment of the minority stockholder and of the corporation itself.

A recent writer, commenting upon the duties of an inactive corporate director, made the following remarks:

> "A dogma which early prevailed (strengthened doubtless, by the circumstance that many corporations then were of the charitable type), and which has not yet disappeared, assumed that directors were rendering gratuitous service to stockholders and that accordingly there should be imposed upon the position of director as few obligations or hardships as possible, in order that men of the desired character would more readily accept election. If this idea proceeded from the

---

[12] North Hudson Loan Assoc. v. Childs (1892), 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57.

Digitized by Google

supposition that it was desirable for the benefit of the stockholders or the corporation to secure as directors men of a peculiar qualification or standing, the stockholders on the other hand should be allowed to rely, in some degree at least, upon the effect of the same supposition. That reliance is frequently very real and of important consequences, but if such reliance is now to be entirely disregarded in determining the responsibility of directors, then the popular notion of the corporate director is not in harmony with the legal notion; and the only real question is whether the legal or the popular conception should prevail, whether really any desirable end is to be secured by adhering to the strict and perhaps inapplicable rules developed in the course of faltering attempts to define the position and duty of a director. It may be said that this requires the substitution of a practical or ethical standard for an existing legal standard which, however fallacious, is certain; but such substitution is the normal method by which legal rules are often developed, and if in this instance the law cannot lend itself to such development, it fails of its purpose."[13]

Another writer summing up his observations upon this question of the responsibility of a director in our modern corporation, asks these questions:

"Where else in human affairs may be found so admirable a combination of distinction without anxiety, of reward without toil? Would it not be well for the corporations and society at large, if penalties that are admitted to be proper in the abstract were insisted upon until the prodigious number of pseudo-directors who are now in evidence were 'squeezed out' and a really hard-working director, as distinguished from an officer, became less of an anomaly than he seems under present conditions?"[14]

There is much of wisdom and warning for directors in the expression found in a recent case in Georgia.[15]

"Unfortunately some directors appear to think that they have fully discharged their duties by acting as figure-heads and dummies; but this is a mistake and a delusion from which some of them are now and then awakened by a judgment for damages arising from allowing the corporation to be looted while they sat by negligently and looked wise."

Perhaps the difficulty which has confronted the courts in announcing a general rule which can be applied with satisfaction to all directors would be simplified if we should abandon the ordi-

---

[13] (1908), 8 Col. Law Rev. 18, 25.
[14] 17 Yale Law Jour. 33, 42.
[15] McEwen v. Kelly (1913), 140 Ga. 720, 79 S. E. 777, 779.

Digitized by Google

nary position of looking at all directors of corporations as in the same position irrespective of the purposes or the nature of the business of the particular corporation concerned. Would it not be advisable to divide corporations into several classes for this purpose, as has been suggested, in connection with the problem of determining their implied powers? Such a classification might be as follows: (a) ordinary manufacturing, mining, or trading corporations; (b) monied corporations, as banks or insurance companies; (c) public service corporations; (d) charitable, educational, or religious corporations.[16] For each class of cases we might be able to approximate a general rule based upon a number of decisions in each group. No abstract general rule sufficient to solve all difficulties, will ever be developed but experience in each particular line of business will soon develop a rule of conduct sufficient to protect all those interested.

It has been suggested that the easiest way of solving this difficulty is to adopt a trusteeship as a substitute for incorporation. Under that arrangement the trustee would resemble an officer and not a director and be directly responsible to the stockholders and therefore subject to fewer immunities than the present director.[17]

Turning now to the law on this subject in the State of California we find few cases which actually hold directors responsible for negligence and carelessness in the management of corporations. This may be accounted for in part by the fact that there seems to exist a common impression that directors are not responsible for their non-attendance upon their duties and by the further fact that those who prepare pleadings do not clearly distinguish between the various grounds of recovery against directors.

The common law rule was first recognized in the case of Neall v. Hill.[18] In that case the directors were charged with mismanagement, neglect of accounts, and other irregularities, which caused a depreciation in the value of the stock. In deciding the case the court held that:

> "In respect to the diminution in the value of the stock it does not sufficiently appear that such diminution was caused by any mismanagement of the officers of the corporation. We

---

[16] Canfield and Wormser Cases, p. 229; State v. Milwaukee Ry. (1912), 136 Wis. 179, 116 N. W. 900; United States v. Union Pac. Ry. Co. (1878), 98 U. S. 569, 25 L. Ed. 143.

[17] 74 Centr. Law Jour. 360; Sears "Effective Substitutes for Incorporation".

[18] Neall v. Hill (1860), 16 Cal. 146.

Digitized by Google

> do not think that, under the circumstances, any loss on this account is justly chargeable in these officers. A liability of this character should only be enforced in a very clear case, and where the loss has been occasioned by gross negligence or wilful misconduct."

This was an extremely liberal statement of the rule.

In the case of Fox v. Hale & Norcross Company,[19] the Supreme Court of this state recognized a duty resting upon directors and a liability on the ground of negligence. In that case some of the directors had not participated in the management of the affairs of the company but had allowed the business to be carried on under the direction of one member of the board. An action was brought by a stockholder to recover money paid out in extravagant prices for services and materials appertaining to the business of the corporation. These directors were not guilty of any active fraud but merely of negiligence. The court held:

> "But they were not charged with negligence in the complaint, but only with fraud. Fraud and negligence, however culpable, are not the same thing. It is true that, when negligence causes an injury of the same character as would be occasioned by an intentional fraud, it is visited with the same consequences, so far as compensation to the injured party is concerned, but the plaintiff has no right to demand a conviction of fraud when no fraud has been committed. When he relies on fraud he ought to plead fraud, and when he relies on negligence he ought to plead negligence, not only because the defendant has a right to know what the charge is which he is called upon to meet, but because the defenses are different. An action for relief on the ground of negligence is ordinarily barred by the statute in a shorter time than an action for relief on the ground of fraud."

In the case of Pacific Vinegar Works v. Smith[20] the question of the duties of directors in the management of a corporation was presented in a very practical situation. The action was brought by a corporation against the estate of the deceased president to recover as damages, the balance remaining due on certain promissory notes executed by him as president of the corporation, without authority and against the express instructions of the board of directors. It was sought to charge the directors with responsibility based upon their knowledge of the facts contained in the books of account and record of the corporation. The court, speaking

---

[19] (1895), 108 Cal. 369, 424, 41 Pac. 308, 325.
[20] (1907), 152 Cal. 507, 513, 93 Pac. 85.

Digitized by Google

through Mr. Justice Henshaw, stated the rule as follows:

> "In this, appellant contends for the rule that the officers, and particularly the directors of a corporation, are chargeable with knowledge of the facts which its books of account and record disclose. This is unquestionably the rule, a rule, as is said by Mr. Justice Brewer in *First National Bank of Fort Scott v. Drake*, 29 Kan. 311, (44 Am. Rep. 646), which is 'founded in public policy, essential to the safety of third parties in their dealings with the bank, and to the protection of the stockholders interested in its welfare and safe management. So far as is necessary to accomplish these results, it should be carefully and strictly upheld; but it should not be carried beyond this, or to such an extent as to work injury to the bank.' The rule itself and the limitation of its application cannot be more aptly stated than in the language just quoted. It is designed to protect, and limited to the protection of, third parties and of stockholders, whose trustees and agents the directors are."

The rule could not be applied to the situation before the court since it was being urged against the corporation on behalf of a president who had been faithless to his trust and had taken advantage of his position.

In an earlier case between the same parties,[21] where the corporation was seeking to enjoin the transfer of the notes above referred to but which were not then due, and in which the plaintiff Smith was also seeking to recover the amounts of the notes against the corporation, this question of the knowledge of the directors was discussed by the court. It was raised in connection with the contention made by the defendant Smith that the board of directors had ratified his acts in dealing with the notes and that since the directors were charged with knowledge of the affairs of the corporation they had ratified the transaction by failing to object. The court, however, held that the directors under the facts of the case were not in fault. They were excused because it affirmatively appeared that knowledge of these facts was concealed from the board of directors by the secretary and by the president of the board. The directors made inquiries in open meetings about these transactions and were deceived by the affirmative answers of the secretary and by the silence of the president. The court concluded:

"Under these circumstances it cannot be successfully argued

---

[21] Pacific Vinegar Works v. Smith (1904), 145 Cal. 352, 357, 78 Pac. 550, 104 Am. St. Rep. 42.

Digitized by Google

> that the president of the corporation is entitled to invoke the doctrine of implied ratification, and thus reap the fruits of his own concealment."

In the case of Nash v. Rosesteel[22] it was held that where the good faith of directors was not attacked in the transaction and no actual knowledge of an erroneous inventory nor an intent to deceive were relied upon that the directors

> . . . "were justified in relying upon subordinates and employees for data upon which to base their corporate action in declaring the dividend, and were justified, in the absence of anything constituting gross negligence, in accepting and acting upon their reports."

The duty of a director has been clearly distinguished from the duty of an officer of a corporation, such as a manager. The leading case upon that subject in this state is San Pedro Lumber Company v. Reynolds.[23] The manager of a corporation and the book-keeper were charged with neglect of duty and the abstraction of corporate funds. On appeal it was contended on behalf of the manager that

> " . . . he was liable only for want of ordinary care in employing the bookkeeper Drane; that Reynolds' position is like and his responsibility the same as that of a director of a corporation in his relation to the stockholders. [Cases cited] . . . The duties of Reynolds as manager are not identical with the duties of a director, and the cases are not in point. Reynolds was the agent of the corporation."

Although this case does not give us a rule concerning the duties of directors, it does declare that their duties are somewhat different from and not as strict as, the duties of their immediate employees who are entrusted with the affairs of the corporation. Where directors receive pay for their services and practically full compensation for their time they should be held for the same degree of care as a manager.[24]

These authorities although they do not provide us with a complete working rule, nevertheless, clearly recognize that in this state a director is liable for neglect of duty under the common law doctrine. His liability, however, is not entirely regulated by that rule but has been modified by a constitutional provision

---

[22] (1908), 7 Cal. App. 504, 509, 94 Pac. 850. See, however, Cornell v. Seddinger (1912), 237 Pa. 389, 85 Atl. 446.

[23] (1898), 121 Cal. 74, 81, 53 Pac. 410.

[24] Billings v. Shaw (1913), 209 N. Y. 265, 103 N. E. 142.

Digitized by Google

and a number of legislative enactments.[25] Some of these provisions will be referred to particularly since they associate themselves with the question under discussion.

Article twelve, section three of the Constitution reads in part as follows:

> "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation, or joint-stock association, during the term of office of such director or trustee."

This provision was first construed in the case of Fox v. Hale & Norcross Company, *supra*. The court, speaking through Chief Justice Beatty, said

> "This clause of the constitution has never been construed, so far as I can discover. According to its literal terms, every director of a corporation is severally liable for the full amount of any misappropriation of its funds during his term of office, without respect to any question as to his own culpability, and the argument of counsel is that it must be enforced according to its letter,—*ita lex scripta est*,—and hence a director, no matter how innocent he may be, and no matter how hard the case may be, must be adjudged to pay, at the suit of any stockholder, the whole of any misappropriation of corporate funds occurring during his term of office. And therefore, according to the contention of counsel, if some large stockholder of the Hale & Norcross Company, with the sole purpose of protecting his own interests and the interests of the other stockholders, had, by cumulating his stock, secured an election to the board of directors, and as a member of the board, had opposed the milling of low-grade ores, or the payment of more than $4.50 per ton for milling, and had to the utmost of his ability, guarded the interests of the company in every direction, he could, nevertheless, have been singled out by any stockholder and compelled to make good the entire loss caused by the willful and corrupt misconduct of a hostile board.
>
> "If this construction must obtain, it seems very clear that no man with any property or character to lose will be willing to serve as director of a California corporation after it becomes known that the constitution contains such a provision. I do not think, however, that the construction contended for can be allowed. It does seem that it was the

[25] Cal. Const., art. xii, § 3; Cal. Civ. Code, §§ 308, 309, 578, 579; Cal. Pen. Code, §§ 558-572, incl.

Digitized by Google

> intention of the farmers of the constitution to make each director of a corporation severally liable, whether individually culpable or not, for *certain kinds of losses* to the corporation occurring during his term of office; that is to say, he is made liable for embezzlement or misappropriation of corporate funds by officers of the corporation. But in my opinion the word 'misappropriation' is to be construed by the maxim *'noscitur a sociis'*. It means something like embezzlement, or, in other words, it means the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation,—which is this case. For losses occasioned by such means the law affords an ample remedy, without the need of resorting to the constitution, against those who are justly responsible, whether by reason of fraud or negligence; but the law does not in such cases visit upon the innocent the sins of the guilty, and if the liability arises from negligence, the action must be commenced in two years after it accrues, whereas, if it arises out of fraud, it may be commenced at any time within three years after the discovery of the facts."

For "certain kinds of losses" then the director was to be responsible irrespective of his negligence or other culpability. Poor management and extravagant prices were not included under the term "moneys misappropriated". A few years later the court was again called upon to determine whether certain other transactions were included in that term. That was in the case of Winchester v. Howard.[26] That was an action by a depositor in a savings bank brought on behalf of himself and any other creditors of the bank who might choose to join, seeking to hold the directors liable for money alleged to have been misappropriated by the defendants while they were directors of the savings bank. The particular acts complained of consisted in taking money out of the savings bank and advancing it to another bank in which the directors were interested as stockholders and taking in return for the money, the unsecured paper of the second bank. The plaintiff sought to charge the defendants under the provisions of the constitution making them liable for moneys embezzled or misappropriated. The complaint was demurred to and the demurrer was sustained in the lower court. The Supreme Court, on appeal, reversed the decision of the lower court and overruled the

[26] Winchester v. Howard (1902), 136 Cal. 432, 443, 64 Pac. 692, 89 Am. St. Rep. 153.

Digitized by Google

demurrer. The principal question in the case was whether the facts alleged constituted a misappropriation within the provisions of the constitution. It was strongly contended that the dealings of the directors with the moneys of the savings bank did not amount to a misappropriation but were merely bad investments in unsecured paper and that, therefore, the liability was one based on negligence or fraud and not upon the constitutional provision as construed in the case of Fox v. Hale & Norcross Company, *supra*. The court in deciding that the acts complained of amounted to misappropriation within the provisions of the constitution, based its conclusion upon the following grounds:

> "Directors and officers of corporations, as well as trustees, have always been held responsible for loss resulting from misappropriations of the trust property made by them or with their consent. The character of the misappropriations for which the officers who made them can be held responsible to the corporation has been settled in many cases. The liability has existed ever since there have been courts of equity and corporations or trustees. The constitution does not change the nature of the liability, except that for its purpose it is limited to *moneys* misappropriated. No officer, omitting for the nonce the suretyship, is made liable for any act or to any greater extent than he was liable before the constitutional amendment. The constitution merely makes the directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. What such liabilities are, as I have said, are old and familiar questions, and, I repeat, it seems obvious to me that such misappropriations are those for which the directors are liable.
>
> "Both sides rely upon some remarks made in *Fox v. Hale & Norcross Company*, 108 Cal. 369. Nothing decided in that case, and no doctrine announced, is at variance with these views. The allegations of the complaint in this case clearly bring it within the rule there laid down. The misappropriations are like embezzlements, and there was a 'misappropriation of funds intrusted to an officer for a special purpose, by devoting them to some unauthorized purpose'.
>
> "I do not contend that the directors are liable beyond that. Not that the measure is harsh, and to be limited for that reason. Nor do I appreciate the importance of the question whether the law is penal or not. It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon

Digitized by Google

the very letter of his bond. But the language of the law is unambiguous, and the words used have well-defined meaning and have been frequently used by courts in relation to the same species of liability for centuries.

"No one contends that the suretyship extends to damages resulting from mere negligence not resulting in some misappropriation, nor to loss through bad management or incompetency or mistake, and I have no criticism to make upon the language used in *Fox v. Hale & Norcross Company,* 108 Cal. 369, unless there is an intimation that the plain language of the law is to receive some unusual construction on the supposition that it is a harsh and unwise law. Whether the policy be good is not for us nor for the legislature. The design plainly was to prevent speculating in corporate funds by directors and to make them vigilant for their beneficiaries.

"Upon this general subject counsel for respondents states a case which he evidently thinks a difficult one. Supposing Howard had no personal interest in the alleged misappropriations, but was animated only by a desire to promote the interests of the savings bank, the question would test the matter very well. He says national banks cannot loan on real estate; savings banks, with some exceptions, can loan on no other security. If loans were made by each bank in violation of this rule, but solely in the interest of the bank, would the loan constitute a misappropriation for which the directors would be liable? If loss ensued, unquestionably the directors would in each case be liable. (Cal. Civ. Code, § 2238.)

"The rule of *noscitur a sociis* may be further illustrated. Section 17 of article XI of the constitution declares that the using of public money by an officer having charge of it for any purpose not authorized by law shall be a felony. Section 21 of article IV is of similar effect, and was in the former constitution. Section 424 of the Penal Code, which was in force when the present constitution was adopted, makes it a felony in an officer having the custody of public money to use the same for any purpose not authorized by law. These are examples of the misappropriation of trust funds. I think it clear that when an officer of a corporation knowingly appropriates funds intrusted to him, for unlawful and unauthorized purposes, and loss ensues to the corporation, the directors are liable under this clause of the constitution."

There was a dissenting opinion in this case, a part of which was as follows:

"It is not alleged that the money was embezzled by any officer of the corporation. It is not alleged that it was used for any unlawful purposes or converted by any officer to his own use, It may be, and probably is, true that the money of the savings bank should not have been loaned without

Digitized by Google

> security, but we cannot think that a loan made by an officer of a bank, in good faith, for the bank and not for his own gain, would be a misappropriation within the meaning of the constitutional provision."

This dissenting opinion was based upon the proposition that the facts alleged in the complaint constituted maladministration in the affairs of the bank rather than a misappropriation of its funds.

The decision of the court in this case can be rested upon the fact that the money in the savings bank was indirectly used for the benefit of the defendants who were stockholders in the bank to which it was handed over. It was misappropriation approximating embezzlement and the court so states "it may well be contended that these acts constitute embezzlement under section 506 of the Penal Code." The money was used to keep alive a concern in which the defendants were interested. It was not an investment based upon a transaction with an independent third person. They were indirectly using the money for their own purposes. "While directors have great powers as directors they have no special privileges as individuals."[27]

In a more recent case,[28] an action was based upon allegations of misappropriation under the provision of the constitution. The directors were sought to be charged with misappropriations alleged to have been made by the president of the board. He had undertaken to sell stock to certain people, had received their money. He supplied them with treasury stock, later purchased outstanding stock and returned it to the treasury. The court held that the money taken from these persons was not money of the company "misappropriated" because the sales were merely sales by the president for future delivery made on his own account. The company was in no way responsible for them. The evidence was in conflict on many points and the court granted a non-suit as to the defendant directors.

In another case, directors of a corporation were held liable for moneys misappropriated.[29] In that case money was deposited by laborers with the corporation, a general trading concern, for safe keeping. It was used by the company for its own purposes and the

---

[27] People v. Knapp (1912), 206 N. Y. 373, 99 N. E. 841. See 5 Mich. Law Rev. 559, commenting on People ex rel. Perkins v. Moss (1907), 187 N. Y. 410, 80 N. E. 383.

[28] Hercules Oil Co. v. Hocknell (1907), 5 Cal. App. 702, 91 Pac. 341.

[29] Vujacich v. The Southern Commercial Co. (1913), 21 Cal. App. 439, 132 Pac. 80.

Digitized by Google

court held that the directors before the court were personally liable. The decision was based on the case of Winchester v. Howard, *supra,* but the constitutional provision was not discussed.

> "Where the business of receiving deposits by a corporation is so general as it was with the corporation defendant herein, it must be presumed that the directors had full knowledge of the manner in which such moneys were kept or used, and unless a showing is made of some excuse, such as a protest offered by the director not consenting to the misappropriation and of steps taken by such director to prevent loss from accruing to the depositors, such director becomes personally liable to the persons damaged."

The court held that the evidence was sufficient to show that the money had been embezzled by the officers of the corporation. It was delivered for safe keeping merely and any investment amounted to a misappropriation under the terms of the trust. This court announces a very strict rule of conduct for directors and practically makes them sureties for their fellow directors by presuming knowledge on their part, and this without relying upon the provisions of the constitution. When knowledge is presumed, their consent is presumed unless they take active steps to show that they do not consent.

The provision of the constitution under discussion has been held to be self executing and the proper remedy on behalf of creditors is by a bill in equity where all the creditors are parties or are represented.[80] In the case of Winchester v. Howard, *supra,* it was held in this connection that any creditor may institute proceedings upon this liability and if the necessary parties are not brought in and that fact is made to appear, the court should order them to be brought in.

After the decision in the case of Winchester v. Howard, *supra,* a compromise was made wherein one of the defendants paid to the plaintiffs a certain sum of money. Subsequent to that time one of the creditors of the corporation who had not joined in the suit petitioned for a share of the amount received by the other creditors by way of compromise. It was held that he could recover no portion of that amount.[81] The liability of directors under this constitutional provision is not penal but is contractual and does not

---

[80] Winchester v. Mabury (1898), 122 Cal. 522, 55 Pac. 393.
[81] Niccolls v. Rice (1905), 147 Cal. 633, 82 Pac. 321.

Digitized by Google

terminate on the death of the director but survives against his estate.[32]

Referring to the principal provisions of the Civil Code on this subject it is apparent that they were not drafted for the purpose of making more definite the duty of a director to use care and diligence in the management of the affairs of a corporation. Section three hundred and eight in this connection merely provides "They must perform the duties enjoined on them by law and the by-laws of the corporation." Section three hundred and nine merely prohibits them from making dividends except from the surplus profits of the business and from creating debts beyond their subscribed capital stock and from dividing, withdrawing, or paying to stockholders any part of the capital stock and from changing the amount of capital stock excepting as provided in the statute. This section does provide, however, that directors who enter their dissent on the minutes at the time shall not be liable for any of those acts, also, that they shall not be liable if they are absent from meetings when those acts happen. This latter provision does not tend to enhance the responsibility of directors in this matter because they may excuse themselves from responsibility by mere non-attendance which, as a matter of fact, is a common kind of negligence on their part.

Section five hundred and seventy-eight of the same code does not offer any substantial protection to corporations or persons interested therein. That section is concerned with savings and loan corporations and provides that where any director or officer shall borrow any of the deposits or funds of such corporation, his office shall thereupon become vacant. This provision can only be availed of at the instance of the state.[33] A more complete and detailed basis of liability than the one found in the Civil Code has been worked out in the Penal Code of this state.[34] Section five hundred and sixty-eight of that code provides

> "Every director of a corporation or joint-stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of this chapter."

Section five hundred and sixty-nine of the same code provides in

---

[32] Major v. Walker (1913), 23 Cal. App. 465.

[33] Brittan v. Oakland Bank of Savings (1899), 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

[34] §§ 558 to 572, incl.

Digitized by Google

part that every director who is present at a meeting where any act in violation of a provision of the Penal Code occurs is deemed to have concurred therein unless he enters his dissent upon the minutes. Instead of excusing a director from liability on account of absence from a meeting as is done in section three hundred and nine of the Civil Code, section five hundred and seventy of the Penal Code provides that

> "Every director of a corporation or joint-stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter and does not within that time cause, or in writing require his dissent from such illegality to be entered in the minutes of the directors."

For the healthy development of corporations and their business relations in general, more emphasis should be put upon the civil liability of directors than upon their penal liability. Many penal statutes have been passed because civil relief has been found inadequate. In this state conditions could be materially remedied by putting into the Civil Code provisions resembling the sections of the Penal Code above cited.

It is undoubtedly true that the courts are striving to fix definitely the responsibility of directors. Legislation can be of assistance, but before it can be effective business conditions must be analysed and corporations must be classified according to the nature of their business. The rule that directors must exercise "the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs",[85] might be the only rule for the directors of some corporations and be extremely harsh for others.

Business reorganization may be capable of developing directors of different classes, those directly charged with the management of the business, quasi managers, and those standing in an advisory capacity merely. Heretofore men have felt justified in undertaking more directorships than they could possibly understand or give their attention to. The consequence is that the investing public, stockholders and creditors, have often lost their money

---

[85] Hun v. Cary (1880), 82 N. Y. 65.

Digitized by Google

and have not been reimbursed. The attitude of the public toward corporate directors seems to be this:

> "Can anybody bring them to account? It is next to impossible to do so. If you undertake it you will find it a game of hide and seek, with the objects of your search taking refuge now behind the tree of their individual personality now behind that of their corporate irresponsibility".[86]

This attitude is justified in large measure by past experiences but it fails to take into account the efforts of the courts of the present day to answer the demands of the investing public. Investigation of the recent decisions of the courts will show that they are entirely sympathetic with those demands. Before this problem can be satisfactorily solved the courts must be assisted with some well considered legislation and business reorganization.

M. C. Lynch.

Berkeley, California.

---

[86] Woodrow Wilson, "The New Freedom".

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year Single Copies, 50 Cents

A. M. KIDD, Editor-in-Chief
H. S. DON CARLOS, Student Editor-in-Chief
M. P. GRIFFITHS, Business Manager

Faculty Board of Editors

WM. CAREY JONES A. P. MATTHEW
WM. E. COLBY M. C. LYNCH
M. E. HARRISON

Student Board of Editors

ARTHUR ALLYN LYMAN GRIMES
J. C. ALTMAN O. F. MONTANDON
M. C. BAER J. S. MOORE, Jr.
A. H CONARD J. B. OLIVER
T. A. J. DOCKWEILER J. D. RINEHART
G. H. GOBAR E. J. SINCLAIR
G. W. WORTHEN

EDITORIAL NOTES

JUSTICE COURT PROCEDURE

THE article in this number of the Review by Mr. Herbert Harley of the American Judicature Society furnishes a timely criticism by an expert, on the organization of our judcial system. The muckraking magazine articles have failed to effect an improvement on account of the ignorant and misdirected character of the attacks. Their favorite theme has been the criminal law, yet in California, at least, the courts are working with reasonable rapidity in criminal cases and comparatively few appeals are taken. Strange as it may seem to the layman, appellate reversals are the exception. The real improvement in the

Digitized by Google

criminal law lies in the treatment of criminals after conviction. (See the article by Judge Craig, 2 Cal. Law Rev. 263.)

On the civil side the administration of the law is less satisfactory and in Justice Court procedure, the inefficiency is such as to prohibit a resort to it in cases of small claims. A debtor refuses to pay twenty dollars justly due. To compel payment by legal proceedings, the creditor must hire an attorney; the attorney must file a complaint; the defendant may demur; the demurrer must be formally set for hearing; after the ruling on the demurrer and notice thereof, the answer, usually written, is filed; if there are no more pleadings, the case must then be set for trial; after the trial and a decision the losing party may appeal to the Superior Court; there the case must be tried all over again; after the decision findings are prepared with the possibility of a motion for a new trial before the judgment becomes final; then the judgment must be collected—all for twenty dollars. Even the successful litigant must pay his own attorney and doubtless incurs other costs not recoverable. Several times the amount involved would not compensate the attorney for his work, especially when practical considerations are taken into account, such as delays due to congested calendars, absence of judges, other engagements of counsel, inability of witnesses to attend, etc., etc.

The great German jurist Von Ihering in his essay translated under the title "Struggle for Law" preaches eloquently the duty of vindicating one's right no matter how small the right or how great the cost; yet the man with a well filled purse may be pardoned if he declines to spend his money for such a useless proceeding as a Justice Court trial. To the poor man such a law is a mockery. The ineffectiveness of the courts has resulted in calling into existence other bodies to do their work. We have unofficial organizations like the Board of Trade, and state commissions like the Railroad Commission, Industrial Accident Commission, Immigration Commission, Labor Commissioner, etc. A letter to one of these commissions stating an abuse, sets the machinery of the state at work. A telephone message from the office of the Labor Commissioner beats all the Justices Courts in the state when it comes to collecting a laborer's wages expeditiously and without expense. Attorneys now advise clients to appear in person before these commissions, there being no need of a lawyer for small cases except when the question is one which it is desired to take up to the Supreme Court to establish a precedent. Experience has

Digitized by Google

shown how much real and substantial justice can be done in this informal way. It may be in time that we shall tire of the multiplicity of commissions and come back to the system of one court of general jurisdiction. If this is done, however, it will be a judicial tribunal with administrative assistants; a tribunal where the judge will act as mediator in small cases, will frame the issues and through his clerks, issue and serve all process and notices; a court where the poor man can get a judgment without the cost being more than the amount involved.

Digitized by Google

Comment on Recent Cases

AGENCY: AUTHORITY UNDER GENERAL POWER OF ATTORNEY. —In *New York Life Insurance Company v. Daley*,[1] an action was brought on a promissory note signed by the defendant through her husband as her attorney in fact. The note was given to pay the premium on a life insurance policy issued upon the life of the husband wherein the defendant was named as beneficiary, the beneficiary being subject to change at the will of the insured. The power of attorney is in the unrestricted general form commonly used in this state giving authorization to perform a great variety of acts for the use and benefit of the principal which include almost every conceivable mode of dealing with real and personal, tangible and intangible property, enumerating among other powers the power to sign notes in the name of the principal, and "to make, do and transact every kind of business of what nature and kind soever".

The court held that, under the power of attorney given, the principal was not liable on the note as she had no vested interest in the life insurance policy and the note was not executed in pursuance of the powers given. The court applied the rule that powers of attorney must be construed strictly and not extended by implication unless absolutely necessary to carry out the powers delegated.[2] This rule is correct as applied to powers of attorney enumerating certain separate and specific powers and concluding with general terms. It is held that the language, however general in its form, when used in connection with a particular subject-matter will be presumed to be used in subordination to that matter, and although the act done may be for the use and benefit of the principal yet if it is not within the powers expressly given the principal will not be bound.[3]

However, it is submitted that the court erred in applying this strict construction to the power of attorney in the principal case. The purpose of the principal in giving such a power is to confer on the attorney authority to act in all manner of business for the use and benefit of the principal, substituting the agent in the principal's

---

[1] (Sept. 5, 1914), 19 Cal. App. Dec. 324.

[2] (Sept. 5, 1914), 19 Cal. App. Dec. 324, 326.

[3] Renwick v. Wheeler (1880), 48 Fed. 431; Billings v. Morrow (1857), 7 Cal. 171, 68 Am. Dec. 235; Quay v. Presidio and Ferries R. R. Co. (1889), 82 Cal. 1, 22 Pac. 925.

Digitized by Google

place and stead.[4] Such a power should be more liberally construed than one merely general in its operation as to a particular purpose.[5] The principal not having seen fit to place any limitations on the agent the court should not do so for him.[6] Clearly the agent could not do any acts binding on the principal for the exclusive benefit of a third party or of the agent,[7] but having relied on the discretion of the agent he should be bound unless it would clearly appear to a reasonable person that the principal would not have so acted in the conduct of his own affairs.

Such powers as the above are frequently given in order that a person may have his business affairs attended to in his absence. The power is made general for the reason that unforseeable contingencies may arise and it is essential that the agent should have the same power to deal with the situation as the principal would have if present. The scope of the power should therefore be what might reasonably be considered for the benefit of the principal, that is, what the principal might reasonably do if himself present—in short, to vest in the agent the discretion of the principal. In this view of the case it is entirely immaterial that the wife's interest in the insurance policy was subject to being divested. It may be and often is extremely beneficial to protect contingent or expectant interests. Under the doctrine of the principal case, one assumes considerable risk in dealing with an agent under a general power, and unless the wording of the form in common use can be changed to make it really general, an absent principal will be greatly handicapped in the conduct of his business.

C. R. S.

ALIENS: RIGHT OF ALIEN TO ACQUIRE LAND BY DESCENT UNDER TERMS OF TREATY OF 1783 WITH SWEDEN.—In the absence of statute[1] or treaty[2] an alien cannot acquire realty by descent, at common law. The question whether a Swedish alien is entitled to inherit realty was raised by *Johnson v. Olson*[3] in the Kansas Supreme Court. It was not seriously contended that such a right existed except under section six of the "Treaty of Amity and Commerce", between the king of Sweden and the United States, negotiated in 1783.[4] The court held, that since the treaty was

---

[4] Muth v. Goddard (1903), 28 Mont. 237, 72 Pac. 621; Auwarter v. Kroll (Wash., 1914), 140 Pac. 326; Seymour v. Oelrichs (1912), 162 Cal. 318, 122 Pac. 847, citing Moore v. Gould (1907), 151 Cal. 723, 91 Pac. 616.

[5] Moore v. Gould (1907), 151 Cal. 723, 91 Pac. 616; Waples-Platter Grocer Company v. Kinkaid (Kan., 1911), 119 Pac. 537.

[6] Veatch v. Gilmer (Tex., 1908), 111 S. W. 746.

[7] Muth v. Goddard (1903), 28 Mont. 237, 72 Pac. 621.

[1] For California provisions see Cal. Civ. Code, §§ 672, 1404.

[2] Blythe v. Hinckley (1900), 127 Cal. 431, 435, 59 Pac. 787.

[3] (July 7, 1914), 142 Pac. 256.

[4] 7 Fed. Stat. Ann. 827, and see note 5, infra.

Digitized by Google

written both in French and in English, and since both copies were originals, the French words "fonds et biens", and the corresponding English words "goods and effects" were to be construed together; and that there being ambiguity in the French and none in the English, the latter should prevail; hence real property could not pass by the terms of the treaty.

It is submitted that both the premises and the conclusion reached are erroneous. The treaty of 1783 was negotiated in Paris, by Benjamin Franklin, and the original written in French, the English version being a translation.[5] Section six of this treaty was re-enacted by reference, in the treaty of 1827, also written in French.[6] It would seem therefore that the only text to be interpreted is the original, and that the test applied should be the meaning of the words as used in the French language, rather than (as in the principal case) the common law definition of the words. The term "biens" in French law means realty as well as personalty,[7] and why its meaning when placed in a French writing should be affected by common law definitions, or a questionable translation, is hard to comprehend.[8]

It is interesting to note that the courts have made no attempt whatever to translate the term "fonds"; while both Cashard and Wright in their translations of the Code Napoleon, have almost invariably translated it as "lands", or "soil".[9] This meaning is also given for "fonds" in the leading French dictionary.[10]

Treaties should be construed in a liberal manner,[11] and the argument that section six includes only personalty robs it of any value whatever, since there never has been any prohibition on the transfer of personalty to aliens, by will or otherwise.[12]

W. W. L., Jr.

ATTORNEY AND CLIENT: MISCONDUCT OF ATTORNEY IN PAYING FOR TESTIMONY.—Where material witnesses refuse to speak unless paid, is an attorney justified in offering money for

---

[5] I Laws of U. S. 176 (Biorens ed.); Sen. Exec. Docts. 2nd Session, 48th Congree, vol. 1, pt. 2, p. 1042, n.; Erickson v. Carlson (Neb., 1914), 145 N. W. 352.

[6] 8 Laws of U. S. 868.

[7] Bouvier's Law Dict.; Code Napoleon, § 516; Adams v. Akerlund (1897), 168 Ill. 632, 48 N. E. 454, 456.

[8] Erickson v. Carlson, supra, note 5; Adams v. Ackerlund, supra, note 7; Re Stixrud (1910), 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912 A. 850; University v. Miller (1831), 14 N. C. 188, accord. Meier v. Lee (1898), 106 Iowa 303, 76 N. W. 712, 715, cited with approval in the principal case, contra.

[9] Code Napoleon, §§ 518, 522, 524; The French Civil Code, E. Blackwood Wright (1908); The French Civil Code, Cashard (1895); see the corresponding sections.

[10] Grande Larousse Dict.

[11] Hauenstein v. Lynham (1879), 100 U. S. 483; Schultze v. Schultze (1893), 144 Ill. 290, 33 N. E. 201.

[12] 2 Cyc. 81.

Digitized by Google

their testimony? This interesting point of legal ethics the case of *In re O'Keefe*.[1] If construed strictly in term ethics the question is, shall the attorney's duty to his c precedence over his duty to the state? The defense o O'Keefe was singularly like that exposition of Lord Brc uttered on the impulse of the moment, in the celebrated of the Queen, where he said, "An advocate in the disc his duty knows but one person in all the world and th is his client. To save that person by all means and ex and at all hazards and costs to other persons and amon to himself, is his first and only duty, and in performing th he must not regard the alarm, the torments, the destruc may bring upon others."

All will admit that an attorney who is defending his c may justifiably avail himself of every honorable means to sa him from injury through the forms of law. But Lord Brougham's principle would justify availing oneself of even dishonorable means to accomplish the end in view. This is not ethical, and were lawyers to follow this construction, we should agree with Seneca, "that lawyers are a venal race".

It takes an iron judge to decide on strictly ethical grounds not biased by human prejudices. Shall he disbar an eminent attorney seeking to maintain his client's honor from the trickery of rogues, who steps one foot without the pale? This was the situation in In re Barnes,[3] that interesting California case relied on by counsel for the defense, characterized in the principal case as "remarkable". It was the outcome of the famous suit of Sarah Althea Hill against Senator Sharon[4] of Nevada. On one side was Judge Terry, a principal in the celebrated Broderick duel of the fifties, and who later married his client; on the other was General Barnes. Here for the last time flared up the dying embers of the old North and South hatred of the Vigilante days. Barnes was duped into believing an important document on which his client's honor hung, was to be had for $25,000. He paid the sum and received a forgery. In the disbarment proceedings that followed, the judge discharged him, saying, "Lawyers meet and are compelled to contend with all sorts of people. They have in their hands the interests of their clients and they should not permit him to lose the benefit of important testimony upon any refined ideas of propriety." This attitude is substantially that of Lord Brougham.

---

[1] (Mont., June 27, 1914), 142 Pac. 638.

[2] Essay on Professional Ethics, George Sharswood, Am. Bar Assoc. Rep., vol. 32.

[3] (1888), 2 Cal. Unrep. Cas. 847, 16 Pac. 896.

[4] Sharon v. Sharon (1885), 67 Cal. 185, 7 Pac. 456; Sharon v. Sharon (1890), 84 Cal. 424, 23 Pac. 1100· Hill v. Sharon (1888), 131 U. S. 438, 33 L. Ed. 223, 9 Sup. Ct. Rep. 799.

Digitized by Google

Undoubtedly the correct view is that of Mr. Justice Miller in In re Thomas,[5] "Lawyers have a duty undoubtedly to their clients, but that is not the first duty as is generally supposed. Their first duty is in the administration of justice and their duty to their client is subordinate to that." It is only necessary to mention the dangerous precedent that is set in paying witnesses for testimony, the demoralizing effect upon the witness, and the close connection between payment for evidence of this kind and bribery therefor. The judge in this case recognizing the danger ordered O'Keefe disbarred for thirty days, this short sentence being given in view of extenuating circumstances.

L. G.

BANKRUPTCY: CONSTRUCTION OF EXEMPTION STATUTES: AUTOMOBILES.—That a person should be given a second chance to make good as a self-supporting citizen, seems to be the reason for the existence of bankruptcy statutes. The courts continue to enforce the spirit of this just provision of statute law by giving to words in those statutes a liberal construction. The ease with which the United States Circuit Court of Appeals of the Eighth Circuit in the case of *Patten et al. v. Sturgeon et al.*,[1] arrived at the conclusion that an automobile was a "carriage", within the meaning of the Oklahoma statute[2] which exempts to every family "one carriage or buggy" seems to be the result of this rule of liberal construction.

In the consideration of penal statutes the opposite rule of strict construction, which has led to several decisions[3] that an automobile was not a "carriage", usually prevails, although in some jurisdictions the courts in considering automobiles as "trucks, vans or wagons",[4] or "carriages"[5] show the tendency toward liberality.

In support of the principal case it may be said that the Court of Civil Appeals of Texas[6] has repeatedly held that in the interpretation of an exemption statute a liberal view should be taken, and has allowed the word "carriage" to include an automobile. The Court of Chancery in New Jersey[7] has decided that an automobile

---

[5] (1888), 30 Fed. 242.

[1] (Apr. 14, 1914), 214 Fed. 65.

[2] Sess. Laws Okl. (1905), ch. 18, § 1, subd. 10.

[3] Commonwealth v. Goldman (1910), 205 Mass. 400, 91 N. E. 392; Doherty v. Town of Ayre (1908), 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816.

[4] Fifth Avenue Coach Co. v. City of New York (1909), 195 N. Y. 19, 16 Ann. Cas. 695.

[5] Scranton v. Laurel Run Turnpike Co. (1909), 225 Pa. 82, 73 Atl. 1063.

[6] Parker v. Sweet (Tex. Civ. App., 1910), 127 S. W. 881; Peevehouse v. Smith (Tex. Civ. App., 1913), 152 S. W. 1196; Hammond v. Pickett (Tex. Civ. App., 1913), 158 S. W. 174.

[7] Diocese of Trenton v. Toman (N. J. Eq., 1908), 70 Atl. 606.

Digitized by Google

was a "carriage" within the meaning of a covenant in a deed reserving a strip of land for a carriage-way. In California the question has not been decided but from a case before the Supreme Court of Iowa[8] in which a statute[9] similar to that of California[10] in the matter of the exemption of teams and vehicles, was being construed, the decision was that an automobile would come under the word "vehicle". This holding, together with the general rule of liberal construction[11] as it is followed in California in regard to exemption statutes, and the additional fact that the word "carriage" is used in the code, make it extremely likely that, should the question arise before the legislature takes up the matter, an automobile would be decided to be a "carriage" or a "vehicle".

G. H. G.

CARRIERS: ACT TO REGULATE COMMERCE: JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION: LEGALITY OF SEPARATELY ESTABLISHED CHARGE FOR INDUSTRIAL SWITCHING.—The practical finality of orders of the Interstate Commerce Commission within the bounds of its administrative authority is attested by the recent decision of the United States Supreme Court in *Interstate Commerce Commission v. Atchison, Topeka and Santa Fe Railway Company*,[1] sustaining the commission's orders in the San Francisco and Los Angeles Switching Cases.[2]

It will conduce to a clear understanding of the issues presented in these proceedings if the explanation is made that carriers by rail customarily make delivery of carload freight by placing the cars in their yards at points to which the public has convenient access. The freight is then unloaded by the consignees and removed by means of drays from the railroad yards. This delivery is ordinarily termed "team track delivery". An industry whose freight traffic reaches large proportions finds it advantageous to secure the installation of a spur track between its plant or warehouse and the rails of the carrier in order that freight may be shipped and received without the expense and delay necessarily incident to drayage from the carrier's team tracks. Such delivery is customarily known as "spur track delivery". Under the general practice of carriers throughout the United States cars are placed upon private spur tracks without the collection of

---

[8] Lames v. Armstrong (Iowa, 1913), 144 N. W. 1.

[9] Iowa Code, § 4008.

[10] Cal. C. C. P., § 690, subds. 3, 6.

[11] Matter of McManus (1890), 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250.

[1] (June 8, 1914), 234 U. S. 294, 34 Sup. Ct. Rep. 814; Interstate Commerce Commission v. So. Pac. R. R. Co. et al. (June 8, 1914), 234 U. S. 315, 34 Sup. Ct. Rep. 820.

[2] Associated Jobbers v. A. T. & S. F. Ry. Co. (1910), 18 I. C. C. 310; Pacific Coast Jobbers and Mfr's Assoc. v. So. Pac. Co. et al. (1910), 18 I. C. C. 333.

Digitized by Google

any charge in addition to the established rate for transportation, but at several points in California (notably San Francisco, Los Angeles and San Diego), a separate charge of $2.50 per car has been imposed for this service. The legality of this practice being challenged by the commercial organizations of San Francisco and Los Angeles, the commission condemned the imposition of the switching charge for the receipt and delivery of carload freight upon industrial spur tracks located within the carrier's established switching limits when the switching service is performed by the carrier enjoying the line haul.[3] It was found that spur track delivery does not represent an additional service, but is merely a substitute for team track delivery. Inasmuch as the transportation charge proper comprehends a terminal service under the established American practice, it was found improper to demand additional compensation for a service which is not of an accessorial character. The Commerce Court refused to concur in the results reached by the commission and enjoined the enforcement of the orders.[4] The Supreme Court, reversing the Commerce Court, holds that the conclusions of the commission with respect to the nature of the spur track service are findings of fact, which, if based upon evidence, are not open to judicial review. In so holding the court follows a well-defined line of cases[5] decided since the passage of the Hepburn Act of 1906.[6] This enactment made the orders of the commission self-executing, compliance being enjoined under severe penalties, and placed upon the carriers the burden of initiating proceedings to test the validity of the commission's action. The measure of the review committed to the courts is extremely narrow. The scope of the court's jurisdiction is outlined with some precision in the leading case of Interstate Commerce Commission v. Union

---

[3] The charge was held unobjectionable when the switching service is performed by a carrier not enjoying the line haul. This distinction was essential under the doctrine of Interstate Commerce Commission v. Stckney (1909), 215 U. S. 105, 54 L. Ed. 112, 30 Sup. Ct. Rep. 67, in which the court sustained the imposition of a separate terminal charge, additional to the transportation rate, for the delivery of live stock at the Union Stock Yards in Chicago beyond the rails of the carrier's lines.

[4] A. T. & S. F. Ry. Co. v. Interstate Commerce Commission (1911), 188 Fed. 229.

[5] B. & O. R. R. Co. v. U. S. (1910), 215 U. S. 481, 495, 54 L. Ed. 292, 297, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Delaware, L. & W. R. R. Co. (1911), 220 U. S. 235, 251, 55 L. Ed. 448, 456, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Union Pac. R. R. Co. (1912), 222 U. S. 541, 547, 548, 56 L. Ed. 308, 311, 312, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. R. Co. (1913), 227 U. S. 88, 92, 57 L. Ed. 431, 433, 33 Sup. Ct. Rep. 185; Atchison, T. & S. F. R. R. Co. v. United States (1914), 232 U. S. 199, 221, 34 Sup. Ct. Rep. 291.

[6] Act of June 29th, 1906, 34 Stat. at L. 584, ch. 3591, U. S. Comp. Stat., Supp. 1911, p. 1288.

Digitized by Google

Pacific Railroad Company, et al.,[7] in which the court reviewed the orders of the Interstate Commerce Commission in the Pacific Northwest Lumber Cases.[8] The court declared that the orders of the commission are final unless "(1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law". As ancillary propositions, it was recognized that an order, regular on its face, may be set aside if "(4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power". The court is completely precluded from substituting its views as to the propriety of rates, regulations or practises for the judgment of the commission. Accordingly, the commission's orders are final, provided that constitutional safeguards are not invaded, that the statute is properly construed, that an adequate hearing is afforded, and that there is evidence to support the findings. The principal case is in accord with recent precedent.

Expressions of the commission in its recent reports in the Industrial Railways Case[9] and the Five Per Cent Case[10] indicate that industrial switching may, under certain conditions, represent an accessorial service not covered by the transportation rate proper, and for which, therefore, a separate compensation may be demanded. The commission has not yet undertaken to distinguish with precision between industrial switching as a substituted and as an additional service, but it is indicated in the Industrial Railways Case that delivery of carload freight to a shipper having a private switch is effected "by shunting the car upon the switch, clear of the main tracks".[11] The placement of a car for loading or unloading at a particular spot convenient to the shipper is held to be in excess of the carriers' common-law obligations. The propriety of the distinction here drawn is suggested by several reports of the commission as well as by decisions of the lower federal courts.[12]

A. P. M.

---

[7] 222 U. S. 541, 547 (supra).

[8] Oregon & Washington Lumber Manufacturers' Assn. v. Union Pacific R. R. Co. (1908), 14 I. C. C. 1; Pacific Coast Lumber Manufacturers' Assn. v. Northern Pacific Ry. Co., et al. (1908), 14 I. C. C. 23.

[9] 29 I. C. C. 212 (1914).

[10] 31 I. C. C. 351 (1914),

[11] 29 I. C. C. 213, 225-226 (supra).

[12] General Electric Co. v. N. Y. C. & H. R. R Co. (1908), 14 I. C. C. 237; Solvay Process Co. v. D. L. & W. R. R. Co. (1908), 14 I. C. C. 246; Crane Iron Works v. Central R. R. Co. of N. J. (1910), 17 I. C.

Digitized by Google

CARRIERS: LIMITATION OF LIABILITY FOR INJURIES TO PASSENGERS.—When a common carrier undertakes to carry a passenger for hire, the courts hold universally that the carrier cannot limit its liability by contract or otherwise.[1] In order that a person may be considered as a passenger for hire it is not necessary for him to pay the regular fare. The giving of any valuable consideration is sufficient.[2] And if there is an actual consideration, it is immaterial that the passenger is carried by virtue of a so-called pass, even though the pass may state upon its face that it is a mere gratuity and that the person accepting it agrees that the railroad company shall not be liable for any injuries to the holder.[3] Such an attempt on the part of the carrier to limit its liability is void as against public policy. If, however, the transportation is purely gratuitous, the carrier can relieve itself from liability.[4]

In the case of *Hageman v. Puget Sound Electric Railway*[5] the plaintiff in her complaint alleged that at the time she entered the employment of the company, she was promised transportation over its lines as part of the consideration for her services. But when she applied for transportation she was forced to sign a printed application by which she acknowledged and agreed that the pass should be a pure gratuity, and that the company should be released from all liability for injuries to her while riding upon the cars. The Washington Supreme Court had in two previous cases adopted the rule that if the pass was a gratuity, the carrier could make a valid stipulation releasing itself from liability,[6] but if the pass was given as part of the consideration for the employee's services such a stipulation was void.[7] The court in the present case, however, sustained a general demurrer to the complaint on the ground that even though transportation did originally constitute a part of the consideration for the plaintiff's services, still that agreement was waived and a new contract entered into when the pass was applied for.

It is difficult to see how the additional element of an application makes a new and valid contract when the same contract

---

C. 514; Chicago & Alton R. R. Co. v. U. S. (1907), 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551.

[1] New York Central R. R. Co. v. Lockwood (1873), 84 U. S. 357, 21 L. Ed. 627.

[2] Grand Trunk R. R. Co. v. Stevens (1877), 95 U. S. 655, 24 L. Ed. 535.

[3] Camden and Atlantic R. R. Co. v. Bausch (Pa., 1887), 7 Atl. 731; Williams v. Oregon Shortline R. R. Co. (1898), 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777.

[4] Northern Pac. R R. v. Adams (1903), 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408.

[5] (Wash., July 17, 1914), 141 Pac. 1027.

[6] Muldoon v. Seattle Ry. Co. (1893), 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, reaffirmed in (1894), 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787.

[7] Harris v. Puget Sound Electric Ry. (1909), 52 Wash. 289, 100 Pac. 838.

Digitized by Google

printed upon the pass alone had been held to be invalid in the earlier case.[8] If the plaintiff had actually earned the transportation as part of the consideration for her employment, the subsequent contract which waived her rights was void. When a valuable consideration actually exists, the courts should look at the facts as they are and should not be misled by a colorable stipulation which the employee is induced to make. In the present case the allegation of actual consideration seems sufficient to present an issue for the jury.

E. J. S.

CONSTITUTIONAL LAW: FEDERAL POLICE POWER.—A recent act of Congress providing for the protection and preservation of "migratory birds", was held by a federal court of the United States to be unconstitutional in the case of *United States v. Shauver.*[1] The act[2] provided that all migratory birds "shall hereafter be deemed to be within the custody and protection of the United States government, and shall not be destroyed or taken contrary to regulations hereinafter provided". The act further authorized the Department of Agriculture "to adopt suitable regulations to give effect to the previous paragraph, by prescribing and fixing closed seasons", and making it unlawful to kill during those closed seasons.

It is submitted the court was correct in its conclusion. The protection of game is a proper subject for the exercise of the police power which is inherent in the states.[3] That the United States may exercise power analogous to the police power of the states it is necessary that such power be derived from some one of the expressed or implied powers given it by the constitution.[4] The "White Slave Act" was upheld under the power of Congress to regulate commerce.[5] The "Lottery Act" was upheld on the same ground.[6] Having exclusive control over the postal system, it has power to prohibit the use of the mails for the transmission of lottery advertisements.[7]

There are only two sources of power under which this "migratory birds" provision could be justified. First, under the power

---

[8] Supra, note 7.

[1] (May 25, 1914), 214 Fed. 154.

[2] 37 Stat. at L. 828, 847, ch. 145.

[3] 19 Cyc. 1006; Ex parte Maier (1894), 103 Cal. 476, 37 Pac. 402.

[4] Black's Const. Law, 3d ed., p. 202; Martin v. Hunter (1816), 1 Wheat. 304, 326, 4 L. Ed. 97; Kilbourn v. Thompson (1880), 103 U. S. 168, 26 L. Ed. 377.

[5] Hoke v. United States (1913), 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. Rep. 281.

[6] Champion v. Ames (1903), 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. Rep. 321.

[7] In re Rapier (1892), 143 U. S. 110, 36 L. Ed. 93, 12 Sup. Ct. Rep. 374.

Digitized by Google

of Congress to regulate interstate commerce.[8] Second, to make rules and regulations respecting property belonging to the United States.[9]

Upon reason and authority this act cannot be sustained as an exercise by Congress of its power to regulate interstate commerce. A bird flying from one state to another is not engaged in commerce or moving as an article of trade within the meaning or definition of that clause, even in the widest extension of that clause in the "White Slave Act".[10] Commerce is defined as that intercourse and traffic, which has to do with the exchange of commodities.[11] If wild game not yet reduced to possession, but flying from one state to another, were within the commerce clause it would be even more questionable whether a state could pass a statute touching such game. However, state acts have been generally upheld touching game brought into and to be sent from one state into another.[12]

Can this act then be sustained under the second power above named? It would seem not, Migratory birds certainly are not property of the United States and by the better view not property at all; like running water they become property by being reduced to possession, and like running water, air and sunshine, are subject to the regulation of each particular state where found.[13]

The fact that Congress could deal with migratory birds more effectively than the states is certainly not a source of federal jurisdiction.

R. J. J.

CONSTITUTIONAL LAW: RIGHT OF STATE TO REVOKE PHYSICIAN'S LICENSE.—A Colorado statute provides that the State Board of Medical Examiners may revoke a physician's license to practice medicine in the state for several causes, among which is "causing the publication and circulation of an advertisement relative to any disease of the sexual organs". In the case of *Chenoweth v. State Board of Medical Examiners*[1] the statute was declared invalid, on the ground, apparently, that it made no declaration to the effect that it was enacted in the interest of public morals. We are to infer from the argument of the court that if, as in a Nebraska statute,[2] the words, "tending to injure the morals of the public"

---

[8] U. S. Const. art. I, § 8, subd. 2.
[9] U. S. art. iv, § 3, subd. 2.
[10] Hoke v. United States (1913), 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. Rep. 281.
[11] 7 Cyc. 412.
[12] Geer v. Conn. (1896), 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600; Ex parte Maier (1894), 103 Cal. 476, 37 Pac. 402; Silz v. Hesterberg (1908), 211 U. S. 31, 53 L. Ed. 65, 29 Sup. Ct. Rep. 10.
[13] McCready v. Virginia (1876), 94 U. S. 391, 24 L. Ed. 248; Manchester v. Mass. (1891), 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559.
[1] (Oct. 6, 1913), 141 Pac. 132.
[2] Neb. Comp. Stats., § 4327.

Digitized by Google

had been added to the words, "diseases of the sexual organs", the statute would have been held valid. This, we submit, is an unjustified method of interpretation. Clearly, if the statute had borne the words indicative of the purpose of the statute, and still had of itself no such purpose or effect, it would not have been saved. But if, by a fair and reasonable construction of the whole statute, the purpose thereof is to promote the public morals, whether expressly so declared or not, the statute ought to be held valid.[3] When the legislature in the exercise of its police power passes a measure prohibiting employment of women on the stage or where intoxicating liquor is sold, or the sale of immoral literature, must it add thereto the words "tending to injure the public morals"? The very purpose of passing such a law, would make such words superfluous. The court seems to put much stress on individual rights, and too little on the far reaching scope of the police power, especially in view of its recent development. This power being of an expansive character, the courts will extend its application as ever changing conditions and protection of society may seem to require,[4] and when a legislative enactment tends to accomplish the protection of public morals, it is a valid exercise of police power. The intent and purpose of the legislature in passing the statute in question seems plain enough, and no external reason or purpose can be imputed to it to rebut the presumption of validity, which always accompanies a legislature enactment unless such reason or purpose is clearly shown by the facts.[5]

As to the advertisement itself, can it be said that advertising a cure for diseases relative to the sexual organs is demoralizing? Courts have upheld statutes prohibiting advertisements relative to "venereal diseases",[6] and "chronic and incurable diseases",[7] upon that very ground. Surely an advertisement relative to "diseases of the sexual organs" cannot have a less demoralizing influence.

In view of the authorities it may be very doubtful if the statute was invalid on the score of vagueness or indefiniteness. The terms "dishonorable and unprofessional conduct",[8] "chronic and

---

[3] 36 Cyc. 1110, Subd. d; 36 Cyc. 1112, Subd. f.

[4] Budd v. New York (1892), 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468; German Alliance Ins. Co. v. Kansas (April, 1914), 233 U. S. 389, 34 Sup. Ct. Rep. 612.

[5] 8 Cyc. 801, Subd. 5; 8 Cyc. 804, Subd. 11.

[6] Kennedy v. State Bd. of Registration in Med. et al. (1906), 145 Mich. 241, 108 N. W. 730, 7 Ann. Cas. 125.

[7] State Med. Bd. of Arkansas Med. Society v. McCrary (1910), 95 Ark. 511, 130 S. W. 544, 22 Ann. Cas. 631.

[8] State v. State Board of Med. Examiners (1885), 34 Minn. 391, 26 N. W. 125; State ex rel Powell v. State Med. Ex. Bd. (1884), 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State v. State Bd. of Health (1891), 103 Mo. 22, 15 S. W. 322; Aiton v. Bd. of Med. Examiners of Arizona (Ariz., 1911), 114 Pac. 962. See note, 7 Ann. Cas. 752.

Digitized by Google

incurable diseases",[9] "gross immorality",[10] have been held by weight of authority not vague or uncertain although they do not state in advance what specific acts or diseases included therein may be in violation thereof. Their ascertainment is left to the common judgment. From the foregoing considerations it seems that the statute might have been upheld. The dissenting opinion commends itself as a clear, concise and accurate view of the law.

R. J. J.

CONSTITUTIONAL LAW: TRADING STAMPS.—The almost uniform denial of the power of a state legislature to pass a law prohibiting the use of trading stamps, on the ground that such laws violate the due process provision of the Fourteenth Amendment, has been broken by the Washington decision in the case of *State v. Pitney*.[1]

The constitutionality of anti-trading stamp legislation has been passed upon in two well-considered cases in California. In the earlier case,[2] the validity of a municipal ordinance, which imposed a prohibitive license tax on merchants using trading stamps, was denied. In this case Chief Justice Beatty, speaking for the court, declared that there was nothing in the nature of a lottery or of gambling in the use of trading stamps. "It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising." In the later case,[3] there was involved an act of the legislature of 1905 making it a misdemeanor to issue trading stamps and coupons. The court held that the act did not fall within the limits of the police power of the state. Mr. Justice McFarland said: "The law therefore, being settled that the legislature cannot prohibit or seriously interfere with the right of the citizen to make harmless contracts touching the acquisition, protection, management, and enjoyment of property,—contracts which do not wrongfully affect the lawful rights of others or the public safety, health, or morals,—the remaining question in these cases at bar is whether trading-stamps or coupons constitute contracts which are outside the protection of the constitutional principles above declared." And in answer to that question, he said "Indeed, an ordinary trading-stamp or coupon is in substance a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right to contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld,

---

[9] State Med. Bd. of Arkansas Med. Society v. McCrary (1910), 95 Ark. 511, 130 S. W. 544, 22 Ann. Cas. 631.

[10] Meffert v. State Bd. of Med. Registration & Ex. (1903), 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed in 195 U. S. 625.

[1] (1914), 140 Pac. 918.

[2] Ex parte McKenna (1899), 126 Cal. 429, 58 Pac. 916.

[3] Ex parte Drexel (1905), 147 Cal. 763, 82 Pac. 429.

Digitized by Google

then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract to which these competitors would strenuously but vainly object."

There are a few cases, cited below,[4] which either uphold, or wink at, anti-trading stamp legislation. "With respect to these cases", to quote the appropriate observation of Mr. Justice McFarland, "we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited [denying the validity of such legislation]; whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way."[5]

The Supreme Court of Washington had formerly gone with the general current of authority,[6] and, in order to take its new position, is compelled to overrule its previous decision. The ground on which the court now proceeds is that the police power has received a new and larger interpretation in recent years. The cases cited in the footnote are relied on as authority.[7] The doctrine of these cases is that the police power of a state "embraces regulations designed to promote the public convenience, or the general prosperity", that "it extends to all great public needs", and "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." This broader conception of the police power is to be warmly welcomed. The only question is whether the court in the principal case is making a proper application of the modern rule. It is submitted that the court has gone too far in its desire to uphold the will of the legislature. What seems the correct position is expressed by the Virginia Supreme Court of Appeals, declaring invalid an act prohibiting the use of trading stamps,[8] in the following words: "Indulging every possible presumption in favor of the validity of the statute now under consideration, we are constrained to the conclusion upon reason and authority, that it is not a valid exercise of legislative power. It attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business. 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.' Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. Ed. 385."

---

[4] Lansburg v. District of Columbia (1897), 11 App. Cas. D. C. 512; Humes v. City of Fort Smith (1899), 93 Fed. 857; State v. Hawkins (1902), 95 Md. 146, 51 Atl. 850.

[5] Ex parte Drexel (1905), 147 Cal. 763, 82 Pac. 429.

[6] Leonard v. Bassindale (1907), 46 Wash. 301, 89 Pac. 879.

[7] Chicago, B. & Q. R. R. Co. v. Illinois (1906), 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. 341; Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. 186; Schmidinger v. Chicago (1913), 226 U. S. 578, 57 L. Ed. 364, 33 Sup. Ct. 182.

[8] Young v. Commonwealth (1903), 101 Va. 853, 45 S. E. 327.

Digitized by Google

Furthermore, the United States District Court for the Eastern District of Washington, passing upon the same statute as in our principal case, has declared the act unconstitutional.[9] Speaking through Judge Rudkin, the court said: "The use of trading stamps and similar devices is neither more nor less than a legitimate system of advertising, and those who employ that system are entitled to the protection of the Constitution of the United States."

W. C. J.

CONTRACTS: BREACH ON BOTH SIDES MAY NOT PRECLUDE AN ACTION IN EQUITY TO RESCIND.—The case of *Crowe v. Oscar Barnett Foundry Company*[1] was a bill in equity to procure the rescission of an assignment contract. Crowe was the owner of a patent for a certain mechanical stoker, and, in consideration of an agreement on the part of the foundry company to pay to him a stipulated royalty, he granted to the company an exclusive license to manufacture this stoker under his patent. Shortly after the making of this agreement, Crowe began infringing by installing a stoker for a certain firm, and thereupon the foundry company procured from a court of equity an injunction restraining this breach.[2] This injunction was subsequently dissolved, and damages awarded against Crowe.[3] For about three years after the date of the first action, the foundry company operated under this contract, and paid royalties to plaintiff. It then abandoned the contract, and made no further payments. Upon this state of facts, the question arose whether plaintiff's prior breach would preclude him from maintaining an action in equity to rescind the contract. The court held that the conduct of the foundry company in retaining the exclusive control of the patent without paying any compensation therefor, operated to inflict upon plaintiff an injury for which he had no adequate remedy at law, and a rescission of the contract was granted.

There can be no doubt as to the correctness of the decision in this case, but the grounds upon which it proceeds are not altogether clear. In giving judgment the court said: "This suit being in equity and not an action at law, the fact that there has been fault on both sides does not preclude the granting of the proper relief to Crowe." This language seems to intimate that if an action had been brought at law, plaintiff's prior breach would have defeated his recovery. But if this is the proper construction to place upon this language, it is not a correct statement of the law. The right to maintain an action at law to recover back what has

---

[9] Little v. Tanner (1913), 208 Fed. 605.

[1] (May 8, 1914), 213 Fed. 864.

[2] Oscar Barnett Foundry Co. v. Crowe (1912), 80 N. J. Eq. 112, 74 Atl. 964.

[3] Oscar Barnett Foundry Co. v Crowe (1912), 80 N. J. Eq. 112, 86 Atl. 915, affirmed in 80 N. J. Eq. 258.

Digitized by Google

passed under the contract, as upon a rescission, depends upon a plaintiff's right to put an end to the contract by repudiating it without liability therefor. It is well settled that a party, himself at the time in default, cannot elect to rescind a contract upon breach by the adverse party going to the whole of the consideration;[4] but it by no means follows that, in the principal case, plaintiff's prior breach caused him to be in default at the time of the bringing of this action. The breach of a contract does not *ipso facto* terminate it, but only gives a right to elect to rescind. This right of election may be waived, either by failure to exercise it within a reasonable time, or by action indicating an intention not to exercise that right. When, after plaintiff's breach, the foundry company sought an injunction against him to compel performance, it thereby unequivocally elected to waive the breach as a ground for repudiation, and so far as plaintiff's right of rescission is concerned, the breach became entirely immaterial. Since plaintiff's prior breach would not have prevented him from maintaining an action at law, nor, under the decision of this case, does it preclude rescission in a court of equity, the case comes within the established rule, that a prior breach, when waived by the adverse party, will not preclude an election to rescind the contract because of a subsequent breach by the other party.[5]

J. D. R.

CONTRACTS: PAROL EVIDENCE: INTERPRETATION BY EXTRINSIC CIRCUMSTANCES.—In the case of *Alaska Treadwell Gold Mining Company v. Alaska Gastineau Mining Company*[1] the United States Circuit Court of Appeals for the ninth circuit refused to allow parol evidence to explain the meaning of a contract to furnish "a current of not to exceed three hundred electric horse power". In a strong dissenting opinion, Gilbert, Circuit Judge, favored the admission of such evidence to bind the defendant to furnish starting surges of four or five times the general current. He based his dissent on the findings of the trial court that it was the custom of the power companies of the locality to furnish reasonable starting surges where the use of only a named current was contracted for, and that the parties both knew that a heavy starting surge would be necessary to a beneficial use of the current provided for in the contract.

Of course, a usage of trade cannot be given in evidence to relieve a party from his express stipulation, or to vary a written contract which is certain in its terms; but it has a legitimate office in aiding to interpret the language of the parties to a contract.[2] Evidence is admissible to show that the terms in a

---

[4] Williston's Wald's Pollock, Contracts, 3rd ed., 345.
[5] Graham v. United States (1911), 188 Fed. 651.
[1] (May 14, 1914), 214 Fed. 718.
[2] Burns v. Sennett & Miller (1893), 99 Cal. 363, 33 Pac. 916; Mil-

Digitized by Google

written contract, by custom of the trade or locality, have acquired a peculiar meaning, regardless of whether such terms are ambiguous or not.[3]

The principal case should fall under this rule, but the court refused to allow the evidence on the ground that it would be adding to the provisions of a written contract. It is not clear, however, that in such case the court would be varying the contract any more, in construing it, by the aid of local custom, to mean three hundred electric horse power with the necessary starting surges, than in the traditional case where the court held one thousand to mean one thousand two hundred,[4] or the case where a contract to pay a weekly salary for two years was construed to mean weekly only during the theatrical season.[5] Sir George Jessel once remarked that "no amount of evidence could convince him that black was white", but he was reversed on appeal on the ground that he should have admitted evidence that a selvage of dark gray color was what was known to the trade as a white selvage.[6] The terms of the contract involved in the principal case surely have no plainer meaning than those of a contract to pay freight on delivery at a certain rate per pound; yet the court in that case allowed the custom of the trade to bind the carrier to allow three month's discount, thus making a difference of about two pounds in the amount due to him.[7] In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it merely interprets the terms. The fact that the contract as construed by the majority of the court is practically a nullity, adds weight to the dissenting opinion. When a contract is susceptible of a construction in accordance with justice and fair dealing, the court should adopt it.[8]

A. A.

CRIMINAL LAW: DUTY OF THE COURT TO SUBMIT THE QUESTION OF PRESENT INSANITY TO SPECIAL JURY.—In the case of *People v. West*[1] the defendants committed homicide in an attempt to escape from the state hospital for the insane and were convicted and sentenced. One defendant had been sent to the hospital upon the certificate of two surgeons of the United States Navy.

---

waukee Ins. Co. v. Palatine Ins. Co. (1900), 128 Cal. 71, 74, 60 Pac. 518; Withers v. Moore (1903), 140 Cal. 591, 74 Pac. 159.

[3] Wigmore on Evidence, § 2463; Browne v. Byrne (1854), 3 El. & Bl. 703, 118 Eng. Repr. 1304; Mitchell v. Henry (1880), L. R. 15 Ch. D. 181, 24 Sol. J. 690; Leavitt v. Kennicott (1895), 157 Ill. 235, 41 N. E. 737; Smith v. Wilson (1832), 2 B. & A. 728, 23 Eng. Com. L. R 319; Newhall v. Appleton (1889), 114 N. Y. 141, 3 L. R. A. 859.

[4] Smith v. Wilson, supra, note 3.

[5] Leavitt v. Kennicott, supra, note 3.

[6] Mitchell v. Henry, supra, note 3.

[7] Browne v. Byrne, supra, note 3.

[8] Noonan v. Bradley (1869), 9 Wall. 394, 407.

[1] (Sept. 4, 1914), 19 Cal. App. Dec. 318.

Digitized by Google

The other defendant had been sent from the state prison upon the certificate of the warden, the physician and the captain of the yard,[2] about a month before the commission of the homicide.

Counsel for defendants requested the court to submit the question of their present sanity to a jury impaneled for that special purpose.[3] The refusal of the court is assigned as error. On the first hearing[4] the court held that there was no prejudicial error; that the doubt referred to is an actual internal doubt in the mind of the judge, in the absence of which he is not required to submit the question to a jury. It was held on rehearing that the question should have been submitted; that the evidence offered was such as to raise a doubt as a matter of law and that the presence of such an external doubt required that the question be submitted.

In effect the ruling declares that a person may be sane enough to be responsible for crime, yet incapable of making a rational defense, though no more insane than at the time the act was committed. On the other hand it is declared that "he may have mental capacity to be placed on trial and yet be insane within the contemplation of the law as to responsibility for a criminal act", although as insane as when the act was committed.

Practically, it may seem anomalous to say that a person may be excused from trial because of the same insanity which will not relieve him of criminal responsibility, and vice versa. But when viewed from the legal aspect, as incapacity, it seems logical. The insanity which deprives him of the knowledge of the difference between right and wrong may not affect his capacity for making a rational defense any more than for making a contract, executing a will, or acting as a witness.

Legally a person is sane in so far as he is capable of acting normally on a given point. The power to offer a rational defense is not necessarily impaired by the absence of the knowledge of the difference between right and wrong. If insanity in no wise affects the capacity for rational action, it should afford no defense. A person is excused from trial not because he is insane, but because insanity has deprived him of the ability to make a defense.

But a pronounced abnormality in one respect may be evidence of a profound mental derangement which may prevent rational action in other matters.[5] It is very dangerous to infer that con-

---

[2] Pen. Code § 1587 provides for sending inmates of the state prison to the state hospital for the insane.

[3] Pen. Code § 1368—"If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity."

[4] (June 5, 1914), 18 Cal. App. Dec. 841.

[5] Stephen's History of the Criminal Law, vol. ii, pp. 160-161.

Digitized by Google

duct apparently bearing no relation to the abnormality is entirely disconnected from it. If capacity for crime were not so narrowly defined—knowledge of the difference between right and wrong—there would be less scope for the practical operation of the logical antithesis between the capacity for crime and the capacity for making a defense.

G. W. W.

CRIMINAL LAW: INTERSTATE EXTRADITION.—Looking at the subject of extradition historically it is significant to note that all efforts to extend the power indiscriminately to new situations and new classes of cases have been stubbornly opposed both in England and in this country.[1] The principle underlying this opposition arises from considerations of public policy and from the nature of extradition proceedings. If the extradition papers set out all the elements of a crime, known to the law of the demanding state and there charged against the person, plus flight from that state, and then the governor honors the requisition,[2] the courts are powerless to interfere.[3] It is because of this absolutism of the extradition power, it is because a person may be transported to the utmost confines of the country without a trial on the merits of the case, that the rule of strict construction is applied,[4] that the courts have so jealously guarded, and must continue so to guard the right of a person sought to be extradited.

In 1908 Harry Thaw on trial in New York for an alleged murder was acquitted by a jury on the ground of insanity; and as a result of this finding of insanity he was confined in the state institution for the insane. While so confined he escaped into New Hampshire; the governor of that state honored the requisition for Thaw's return to New York and the present writ of habeas corpus is brought to resist extradition.

Son in *Ex parte Thaw*[5] we have the novel case—new to the jurisprudence of both England and America—of a person sought to be extradited because he has fled from guardianship custody based upon the verdict of a jury that he was insane. Does such a case satisfy the legal requirements of extradition? As pointed out above, one of these legal requirements consists in setting out the elements of a crime. Now we know the necessary elements of a crime to be an act and an intent;[6] but the very fact

---

[1] 3 Centr. L. J. 636; 2 Moore's Extradition, § 585; 6 & 7 Vict., c. 34, p. 194; 4 N. Y. Cr. R. 601; Lunacy Act of 1890, 53 Vict., c. 5, §§ 86, 89, in which England provided other means than extradition for the return of escaped lunatics upon a charge of crime.

[2] Kentucky v. Dennison (1860), 24 How. 66, 16 L. Ed. 717 (the governor cannot be compelled to grant extradition).

[3] Roberts v. Reilly (1885), 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291; In re Strauss (1903), 126 Fed. 327, 63 C. C. A. 99.

[4] Ex parte Slauson (1896), 73 Fed. 666.

[5] (April 14, 1914), 214 Fed. 423 (now on appeal to the Supreme Court of the United States).

[6] Bishop's New Criminal Law, § 206.

Digitized by Google

of custody based on insanity negatives, at least prima facie, the presence of the element of intent. Therefore it would seem to follow that a crime has not been legally and substantially set forth, and that the court correctly stays the extradition proceedings where the extradition papers themselves show the mental irresponsibility of the person.

The only question before the court was extradition or no extradition. But query: if New York had given evidence of its status as guardian under the *parens patriae* doctrine, and evidence of the ward's escape, and sought return, not upon the ground that Thaw was a criminal but that he was a ward subject to guardianship control, would not New Hampshire in that case have surrendered him up as a matter of comity? The tendency of modern decisions is to recognize, as a matter of comity, the rights of foreign guardians in respect of the persons of their wards;[7] and in many cases the courts have awarded custody of the ward's person to foreign guardians, with right of removal to the state from which guardianship control emanates.[8] The courts have almost uniformly made the welfare of the ward the sole controlling factor in determining whether to recognize a foreign guardianship—thus considering it their duty to give effect to the principle of comity in all cases where the well being of the ward does not interfere.[9]

So it would seem that the proper proceeding on the part of New York should have been something like this: attempt to retake the person of Thaw, there being no liability for false imprisonment for such an act;[10] but if this were unsuccessful, petition the proper court for an adjudication of Thaw's present insanity, and on the basis of this adjudication ask for the recognition of the guardianship status in New York. In such a proceeding, the question before the court would not have been whether the executive acted within his strict legal rights, but whether in the sound discretion of the judicial department alone, guided by considerations of the ward's well-being, the recognition of the foreign guardianship was justified.

J. C. A.

CRIMINAL LAW: OYSTERS AS SUBJECTS OF LARCENCY: RESERVATION OF OYSTER LANDS.—Common-law analogy afforded by growing vegetation, or, perhaps as readily, by stones or pebbles, might easily have induced the courts to regard the lowly oyster as a part of the freehold whereon it lived. However, it is judici-

---

[7] Woodworth v. Spring (1862), 4 Allen 321; Hanrahan v. Sears (1903), 72 N. H. 71, 54 Atl. 702.

[8] Taylor v. Jeter (1862), 33 Ga. 195, 81 Am. Dec. 202; Grimes v. Butsch (1895), 142 Ind. 113, 41 N. E. 328; Nugent v. Vetzera (1866), L. R. 2 Eq. 704, 12 Jur. (N. S.) 781, 35 L. J. Ch. 777, 15 L. T. R. (N. S.) 33.

[9] Woodworth v. Spring, supra, note 7, at p. 325.

[10] Townsend v. Kendall (1860), 4 Minn. 412, 77 Am. Dec. 534.

Digitized by Google

ally settled that oysters and similar shell-fish are chattels,[1] a distinction not immaterial when it is considered that at common law larceny cannot be committed of things savouring of the realty, and, at the time they are taken, parcel of the freehold.[2]

As personalty oysters are usually classified with animals *ferae naturae*;[3] in which latter, according to the same law, such a qualified property can be acquired by reclaiming and taming, or confining them within the owner's immediate control, that, if fit for food, they may be subject of larceny.[4] But "oysters have not the power of locomotion", and "if at liberty, they have neither the inclination nor the power to escape". Consequently the creatures do not always come within the reason and operation of the rule applicable to wild animals generally. Thus where they grow on private lands not a common fishery, property in them vests ordinarily in the proprietor of the soil. Indeed, for most, if not all, practical purposes an owner of oysters has the same absolute property therein that he has in inanimate things or domestic animals.

Similar private proprietary rights may be had in oysters which the owner has planted in a common fishery, on public lands or beneath public waters, in a bed where they did not exist naturally, and which is set off by stakes, or otherwise sufficiently indicated to show private possession,[5] and these rights extend to offspring of parent oysters so planted, remaining within the limits designated.[6] The gathering of such oysters may be larceny:[7] but not, if they are planted in what is already a natural oyster bed, or the bed itself is insufficiently defined, under which circumstances they are treated as abandoned to the public.[8] Whether legislative reservation of public oyster grounds, prohibiting taking of oysters therefrom, amounts to reclaiming the oysters so reserved from their wild condition, and a reduction of them to possession, effective to support a prosecution for larceny of oysters, as the property of the state, is a nice question. But the Supreme Court of Washington answered correctly, it is submitted, when it sustained the

---

[1] People v. Wanzer (1904), 88 N. Y. Sup. 281, which repudiates dictum to contrary in Mott. v. Underwood (1896), 148 N. Y. 463, 470, 42 N. E. 1048, 1050.

[2] Bl. Com. (Cooley's ed.), bk. iv, ch. 17, pp. 233 et seq.

[3] State v. Taylor (1858), 27 N. J. L. 117, 22 Am. Dec. 347; Sutter v. Van Derveer (1888), 47 Hun. 366.

[4] Bl. Com. (Cooley's ed.) bk. ii, ch. 25,pp. 391 et seq.: Id., bk. iv,ch. 17, p. 235.

[5] Fleet v. Hegeman (1835), 14 Wend. 42; People v. Hazen (1890), 121 N. Y. 313, 24 N. E. 484; also cases in notes 3, 6, 7, and 8.

[6] McCarty v. Holman (1880), 22 Hun. 53.

[7] State v. Taylor, supra, note 3; People v. Wanzer, supra, note 1; People v. Morrison (1909), 194 N. Y. 175, 86 N. E. 1120, 195 N. Y. 116, (1909), 88 N. E. 21.

[8] State v. Taylor, supra, note 3; Decker v. Fisher (1848), 4 Barb. 592; Brinckerhoof v Starkins (1851), 11 Barb. 248; Francisco v. Schmeelk (1913), 141 N. Y. Sup. 402.

Digitized by Google

demurrer to the information in *State v. Johnson.*[9] After all there is a difference between animals, which are the property of the people of the state, and a book in the state library, belonging also to the people of the state.

T. A. J. D.

DEDICATION: PARKS: CHANGE OF USE.—A property owner fronting on a street opposite a municipal park seeks to enjoin the Board of Park Commissioners, from erecting in the park a garage for automobiles and auto trucks to be used by members of the park board and their employees in caring for the public parks of the city. The Supreme Court of Oregon, in *Wessinger v. Mische,*[1] holds in the complainant's favor.

Such a structure may amount to one or more of the following: (1) a mere purpresture, (2) a violation of abutters' rights, or (3) a public nuisance. To prevent a mere purpresture, only the fee owner, the trustee, or the public, by its authorized representative, the state, may sue.[2] When the purpresture works an injury to an adjoining property owner, an injury peculiar to him as owner of that particular parcel of property, then such property owner may enjoin its erection or maintenance. When the purpresture amounts to a public nuisance, the public, by its authorized representative, the state, may sue for its abatement. But it is not necessary to show a public nuisance before the property owner can maintain his suit.[3] By the dedication, the public as an indeterminate body, represented not by the city, park board, or county, but by the state, has acquired a right to have that land devoted to park uses. In an analogous manner, the abutting property owner gains a similar right, as a sort of easement to his land, and before he should be allowed to prevail, he must show, not only a violation of the public right (a purpresture) but he must also show a special injury to himself, apart from the public. Whether this amounts to a public nuisance or not is immaterial to his suit.

Where the threatened injury is clearly authorized by the legislature a difficult and unsettled question is raised, as to the extent of the powers of that body to alter or terminate the park, as against abutters.[4] But confining the question to cases where the legislature allows the public easement in the park to remain intact, and eliminating cases where a distinction is made between public parks and public squares, such specific cases as the one in question are in general not difficult of solution.

---

[9] (July 22, 1914), 141 Pac. 1040.

[1] (Ore., June 30, 1914), 142 Pac. 612.

[2] Trustees M. E. Church v. Hoboken (1868), 19 N. J. Eq. 355, and (1868), 33 N. J. Law 13; People v. Park and Ocean R. R. Co. (1888), 76 Cal. 156, 18 Pac. 141; 8 Harv. Law Rev. 234; 12 Harv. Law Rev. 145.

[3] Fessler v. Town of Union (1903), 67 N. J. Eq. 14, 56 Atl. 272, affirmed in Town of Union v. Fessler, 68 N. J. Eq. 657, 60 Atl. 1134.

[4] 3 Dillon, Mun. Corp., 5th ed., 1759.

Digitized by Google

Broadly speaking, park uses are those which promote popular enjoyment and recreation. Public comfort, convenience, and pleasure, with due regard for the aesthetic, are the most general characteristics of park uses. Clearly, public administration buildings, public schools, and all private uses, are not park uses. But a free library and out buildings,[5] monuments,[6] a racetrack (leased to private parties for upkeep and partial public use),[7] a hotel and restaurant,[8] and a park superintendent's dwelling,[9] have been held to be park uses. On the other hand, streets,[10] public highways, a high boundary wall obstructing view of abutting owners,[11] public school buildings, [12] county court house, [13] town hall, [14] city hall with jail in basement,[15] church,[16] fire-bell tower,[17] cemetery[18] and military barracks or hospitals[19] are held not to be park uses. The court in the principal case intimates that the public may properly be excluded from a portion of the park, as from a power house, for the purpose of promoting the enjoyment of the rest of park; but the mere convenience of the park administration is not sufficiently important to justify the erection of a garage such as the one in question.

O. F. M.

EMINENT DOMAIN: UNITY OF PROPERTY: EFFECT OF SEPARATION OF DIFFERENT PARCELS OF LAND BY A PUBLIC HIGHWAY.—In the case of *City of Oakland v. Pacific Coast Lumber and Mill Company*,[1] it was decided that lands separated by a public street may be considered as a whole in assessing damages in eminent domain, if the parcels are used for the same purpose, the use here being that of a milling plant, i. e., a planing mill and lumber

---

[5] Spires v. Los Angeles (1906), 150 Cal. 64, 87 Pac. 1026; Atty. Gen'l v. Sunderland (1875), L. R. 2 Ch. Div. 634.

[6] Parsons v. Van Wyck (1900), 56 App. Div 329, 67 N. Y. Sup. 1054; Hoyt v. Gleason (1892), 65 Fed. 685; Hartford v. Maslen (1904), 76 Conn. 599, 57 Atl. 740.

[7] Bryant v. Logan (1904), 56 W. Va. 141, 49 S. E. 21.

[8] Gushee v. City of N. Y. (1899), 26 Misc. Rep. 287, 56 N. Y. Sup. 1002, affirmed in 42 App. Div. 37, 58 N. Y Sup. 967.

[9] State ex rel. v. Brown (1910), 111 Minn. 80, 126 N. W. 408.

[10] Price v. Thompson (1871), 48 Mo. 361; Pickett v. Town of Mercer (1904), 106 Mo. App. 689, 80 S. W. 285; Mulvey v. Wangenheim (1913), 23 Cal. App. 268, 137 Pac. 1106.

[11] Wheeler v. Bedford (1886), 54 Conn. 244, 7 Atl. 22.

[12] Rowzee v. Pierce (1898), 75 Miss. 846, 23 So. 307; but see Reid v. Edina Bd. of Education (1880), 73 Mo. 295.

[13] McIntyre v. Bd. of Com'rs (1900), 15 Colo. App. 78, 61 Pac. 237.

[14] Princeville v. Auten (1875), 77 Ill. 325.

[15] Church v. Portland (1889), 18 Ore. 73, 22 Pac. 528.

[16] Trustees M. E. Church v. Hoboken, supra, note 2.

[17] Town of Union v. Fessler, supra, note 3.

[18] Comm. v. Alburger (1836), 1 Whart. 469.

[19] Appeal of Meigs (1869), 62 Pa. (12 P. F. Smith) 28, I Am. Rep. 372.

[1] (July 28, 1914), 19 Cal. App. Dec. 177. Rehearing granted by Supreme Court, Sept. 26, 1914.

Digitized by Google

yard. Although it has been decided in California that contiguous lands may be considered as a whole for this purpose,[2] this is the first application in this state of the principle to lands physically separated. That this view is in conformity with the numerous authorities on the subject can hardly be controverted.[3] The test, however, as to whether or not such lands may be considered as one, has been repeatedly held to be whether or not they are in fact used for the same purpose.[4] When this is true, the doctrine may be applied to a farm, the parts of which are divided by one or more highways,[5] or by one or more railroads.[6] As to the latter, however, it may be said that there is a minority view that where the railroad has a fee in the land, the parts are separate holdings,[7] and some courts base their decisions that the lands are a unit on the fact that there exists a statutory duty on the part of the railroads to construct crossings between the parcels.[8] So too, where a canal divides the property, the parts being joined by a bridge, it is considered to be a single tract.[9] Where two parcels of land are separated by an intervening tract owned by another party, but are connected by a way and used for a single purpose, they are considered as a unit.[10] In the case of lands separated by a river, whether they are used together for the same purpose depends largely upon whether they are physically connected or not so as to render such use practicable.[11] Land which has been subdivided upon a map into lots, blocks, and streets, but which is in fact owned by one party and used together for one purpose

---

[2] So. Pac. R. R. Co. v. Hart (1906), 3 Cal. App. 11, 84 Pac. 218.

[3] Lewis, Eminent Domain, 3rd ed., §§ 698, 699; 15 Cyc. 729; Elliott, Roads and Streets, 3rd ed., §§ 288, 289; Elliott, Railroads, 2nd ed., § 9924.

[4] Sharp v. United States (1903), 191 U. S. 341, 48 L. Ed. 211, 24 Sup. Ct. Rep. 114, affirming 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932; St. Louis, etc. R. R. Co. v. Aubuchon (1906), 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Ann. St. Rep. 499, 8 Ann. Cas. 822; Peck v. Superior Short Line Ry. Co. (1887), 36 Minn. 343, 31 N. W. 217.

[5] One highway: Speck v. Kenoyer (1905), 164 Ind. 431, 73 N. E. 896; State ex rel. Biddle v. Superior Court (1906), 44 Wash. 108, 87 Pac 40. More than one: St. Louis, etc. R. R. Co. v. Drummond R. & I. Co. (1907), 205 Mo. 167, 103 S. W. 977.

[6] One railroad: Rudolph v. Penn. etc R. R. Co. (1898), 186 Pa. St. 541, 40 Atl 1083, 47 L. R. A. 782; Missouri, etc. R. R. Co. v. Schmuck (1909), 79 Kan. 545, 100 Pac. 282. More than one: Cook v. Boon Suburban El. Ry. Co. (1904), 122 Ia. 437, 98 N. W. 293.

[7] Kansas City, etc. Ry. Co. v. Littler (1905), 70 Kan. 556, 79 Pac. 114.

[8] In re Lehigh Val. R. R. Co. (1910), 78 N. J. L. 699, 76 Atl. 1067.

[9] Cameron v. Pittsburgh, etc. R. R. Co. (1893), 157 Pa. St. 617, 27 Atl. 668, 22 L. R. A. 443; In re Boston, etc. Ry. Co. (1884), 31 Hun. 461.

[10] Westbrook v. Muscatine, etc. R. R. Co. (1901), 115 Ia. 106, 88 N. W. 202.

[11] St. Louis, etc. R. R. Co. v. Aubuchon, supra, note 4.

Digitized by Google

is considered as constituting one tract.[12] City streets or alleys intervening, do not destroy the unity.[13]

An interesting state of facts is where one parcel has been used for a certain purpose, and another has been acquired with an intention of using it in the future for the same purpose. There it has been held that the doctrine will not apply unless the property was actually used as a unit at the time the action was begun.[14] We submit, however, that this ruling is not in accordance with the doctrine that future uses to which land sought to be condemned is adaptable may be considered in awarding damages.[15] A contrary rule would give a truer measure of damages, and exceptions could be made of the cases of fraud, and where the owner's intention to use the land for a single purpose is merely an "idle dream".[16]

C. W. S.

EQUITY: CONTEMPT: PROCEEDINGS FOR INTERFERENCE IN FOREIGN JURISDICTION WITH LOCAL RECEIVER.—As a result of the basic principle underlying the law of receivership, that a receiver is an officer of the court appointing him and his possession that of the court,[1] it is accepted law that such court may, in a proper case, punish as contempt unauthorized interference with the receiver's possession.[2] *In Strain et al v. Superior Court of Los Angeles County*[3] the facts were these: a receiver, appointed for the property of a development company in Imperial County, in an action pending in that county (subsequently transferred to Los Angeles County), took possession not only of the company's waterworks in the first-named county but also of canals in Mexico, which, though not owned by the company, were operated in connection with its structures as an integral part of one continuous diverting and distributing system, so that water, appropriated by the company from the Colorado River, flowed through the company's canals to the international boundary whence it was conducted by the Mexican canals back again to the American line

---

[12] Scott v. Donora, etc. R. R. Co. (1909), 222 Pa. 634, 72 Atl. 282; Alabama Cent. R. R. Co. v. Musgrove (1910), 169 Ala. 424, 53 So. 1009.

[13] Streets: Union Elevator Co. v. Kansas City, etc. R. R. Co. (1896), 135 Mo. 353, 36 S. W. 1071; Chapman v. Oshkosh, etc. R. R. Co. (1873), 33 Wis. 629. Alleys: Hannibal Bridge Co. v. Schaubacher (1874), 57 Mo. 582.

[14] White v. Metropolitan, etc. R. R. Co. (1894), 154 Ill. 620, 39 N. E. 270; Sharp v. United States, supra, note 4.

[15] Boom Co. v. Patterson (1878), 98 U. S. 403, 25 L. Ed. 206, Sup. Ct. Rep.; St. Louis, etc., R. R. Co. v. Continental Brick Co. (1906), 198 Mo. 698, 96 S. W. 1011.

[16] See Sharp v. United States, supra, note 4; St. Louis, etc. R. R. Co. v. Aubuchon, supra, note 4.

[1] Adams v. Woods (1857), 8 Cal. 306, 316; Pomeroy, Eq. Rem., 3rd ed., § 62.

[2] Pomeroy, Eq. Rem., 3rd ed., § 163.

[3] (July 6, 1914), 48 Cal. Dec. 92, 142 Pac 62.

Digitized by Google

and discharged into the company's canals in Imperial County. With knowledge of the receiver's possession and control, certain persons diverted water from the Mexican canal forming the return connection with the company's system in Imperial County. On certiorari to review an order of the Superior Court of Los Angeles County adjudging these persons guilty of contempt, the Supreme Court held, that inasmuch as they, the petitioners, though not parties to the action wherein the receiver had been appointed, were, nevertheless, residents within the territorial jurisdiction of the Superior Court when the interference occurred and the contempt proceedings were commenced, the Superior Court had not exceeded its jurisdiction in entertaining those proceedings, that jurisdiction not being affected by the circumstance that the act of interference was committed outside the court's territorial jurisdiction.

The facts of this case are unusual, and the decision apparently the first of its kind in California, but the doctrine invoked—that if there be jurisdiction of the parties, jurisdiction to punish for contempt is not affected by the fact that the act of interference with the receiver was committed outside the territorial jurisdiction of the court nor by the fact that the interfering persons were not parties to the receivership proceedings—is sound in theory and well supported by authority.[4] While a receiver as such has no power and authority, except by comity, outside the territorial jurisdiction of the court appointing him,[5] the question is not whether the orders of that court can have an extraterritorial operation *ex proprio vigore,* but whether there has been an interference with the receiver in doing that which the court has directed him to do.[6] A judicial tribunal must enforce respect and obedience to its mandates if it is to be an efficient arm of government, and, consequently, must protect to the utmost its appointed receiver in the discharge of his functions as such against the interference or obstruction of anyone, whether a party to the proceedings in which the receivership was created or not. Moreover, the same reason which justifies a court in enjoining the commission of an act beyond its territorial jurisdiction by a person within that jurisdiction applies to contempt proceedings for interfering with a local receiver by acts done in a foreign jurisdiction.[7]

T. A. J. D.

---

[4] Chafee v. Quidnick Co. (1881), 13 R. I. 442; Sercomb v. Catlin (1889), 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147; Smith v. Hosmer (1891), 84 Mich. 564, 47 N. W. 1092; Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. et al. (1873), 46 Vt. 792.

[5] Ward v. Pacific Mutual etc., Ins. Co. (1901), 135 Cal. 235, 67 Pac. 124.

[6] Chafee v. Quidnick Co. (1881), 13 R. I. 442.

[7] See Pomeroy, Eq. Juris., 3rd ed., § 428; Dehon v. Foster (1862), 4 Allen 545.

Digitized by Google

EQUITY: NECESSITY OF ADEQUATE CONSIDERATION FOR SPECIFIC PERFORMANCE: SECTION 3391, CALIFORNIA CIVIL CODE.—Whether or not the Civil Code, in providing that specific performance cannot be enforced against a party to a contract who has received no adequate consideration,[1] only affirmed the then prevailing doctrine of the California courts,[2] it at any rate evidences an apparent legislative intent to make mere inadequacy of consideration a separate and distinct ground for refusing this form of equitable relief.[3] Consequently, through lack of adequate consideration an aggrieved plaintiff may have no standing in equity and be remitted to his action for damages, even though the party against whom he seeks to specifically enforce the contract, entered into the same freely, with knowledge of such inequality as there may be, and without any unfair advantage having been taken of him.[4] But in every such case adequacy is a question of fact depending upon the particular circumstances involved;[5] that its determination may rest on standards other than monetary would seem an obvious dictate of common sense and everyday experience. Yet a contrary contention was raised before the Appellate Court for the Third Appellate District in *O'Hara v. Lynch*,[6] when an administrator attempted to repudiate a contract entered into by his deceased whereby she agreed to sell to her sister certain realty for a price intentionally fixed at considerably below the property's known value, in order to gratify the vendor's desire to favor the sister and give her a home. In pursuance of this contract, which the deceased at all time recognized as a binding and satisfactory agreement, the vendee had been placed in possession and had paid about three-fourths of the purchase money. The ruling against the administrator was proper, it is submitted, because in view of all the facts the vendor had adequate consideration.

The court, however, pointed to a distinction between executory contracts and those fully or partially performed, and intimated that the necessity of adequate consideration as a prerequisite for specific performance applies only to the former. As the subjects of specific performance or contracts executory in nature, it is clear that the requirements of section 3391 have no bearing on executed contracts, as, for example, bought options.[7] But where

---

[1] Cal. Civ. Code, § 3391.

[2] See Bruck v. Tucker (1871), 42 Cal. 346; Ward v. Yorba (1899), 123 Cal. 447, 56 Pac. 58.

[3] Morrill v. Everson (1888), 77 Cal. 114, 19 Pac. 190; Wilson v. White (1911), 161 Cal. 453, 119 Pac. 895.

[4] Cummings v. Roeth (1909), 10 Cal. App. 144, 101 Pac. 434; Wilson v. White, supra, note 3. Dictum to contrary in Dore v. Southern Pac. Co. (1912), 163 Cal. 182, 196, 124 Pac. 817, 822.

[5] Morrill v. Everson, supra, note 3; Cummings v. Roeth, supra, note 4; Wilson v. White, supra, note 3.

[6] (July 28, 1914), 19 Cal. App. Dec. 148.

[7] Marsh v. Lott (1908), 8 Cal. App. 384, 97 Pac. 163; Smith v.

Digitized by Google

executory contracts were concerned the distinction above referred to has been made, and it has been held that after accepting and retaining the agreed consideration the vendor cannot question its adequacy.[8]

T. A. J. D.

EVIDENCE IN EMINENT DOMAIN PROCEEDINGS: ADMISSIBILITY OF EVIDENCE TO PROVE THE VALUE OF LAND FOR PARTICULAR USES.—Another question of interest was presented in the above case of *City of Oakland v. Pacific Coast & Lumber Mill Company*[1] namely, is evidence of the value of land for a particular use admissible as proof in eminent domain proceedings? The authorities on this point are by no means harmonious in the various jurisdictions;[2] and this lack of harmony seems to have been reflected in the decisions of the California Supreme Court on the same question. Although attempts have been made by our courts to reconcile these various decisions, the position taken by the dissenting judges,[3] the view of a court outside this state as to the effect of one of the cases,[4] as well as the significant language in the latest decision of the Supreme Court[5]—all these things would seem to indicate that the decisions in California are far from being in harmony with each other.

The question is soon to be presented again for the determination of the Supreme Court on the rehearing of the judgment of the District Court of Appeal. That court excluded the evidence in dispute on the ground that "damages must be measured by the market value of the land, at the time it is taken, that therefore while evidence that it is valuable for this or that or another purpose may always be given, the value in terms of money, the price which the land would bring for this or that or the other specific purpose is not admissible".

This confusion and conflict of authority seems to have arisen, in great part, from the misapplication of a correct holding upon two extreme, peculiar situations, to all situations. In estimating

---

Bangham (1909), 156 Cal. 359, 104 Pac. 689; Fraser v. Bentel (1911), 161 Cal. 390, 119 Pac. 509.

[8] Nicholson v. Tarpey (1886), 70 Cal. 608, 12 Pac. 778; Fleishman v. Woods (1901), 135 Cal. 256, 67 Pac. 276; Meridan Oil Co. v. Dunham (1907), 5 Cal. App. 367, 90 Pac. 469. But see Prince v. Lamb (1900), 128 Cal. 120, 60 Pac. 689; Kaiser v. Barron (1908), 153 Cal. 788, 96 Pac. 806.

[1] (July 28, 1914), 19 Cal. App. Dec. 177.

[2] See authorities collected in Lewis, Eminent Domain, 3rd ed., § 707, notes 12 and 13.

[3] San Diego Land, etc. Co. v. Neale (1888) 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Spring Valley Water Works v. Drinkhouse (1891), 92 Cal. 528, 28 Pac. 681.

[4] Alloway v. Nashville (1890), 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

[5] Sacramento etc. R. R. Co. v. Heilbron (1909), 156 Cal. 408, 104 Pac. 979.

Digitized by Google

the value of property taken for public use, all authorities agree that it is the market value which is to be considered.[6] But where the seller attempts to introduce evidence as to special value to himself—as for example, because of his unwillingness to sell[7] or because of any sentiment he has for the property[8] or because of the good will of a business due to a certain location[9]—or evidence as to the special value which the land has for the buyer[10]—as for example, because it is the only land available for a fortification,[11] or because it is the nearest supply of gravel[12]—he is violating the test of market value of property, which is the "price it will bring when offered for sale by one who desires, but is not obliged to sell it, and bought by one who is under no necessity of having it".[13] Therefore it would appear, on principle and reason, that the courts should exclude any evidence to show a special value to buyer or seller.

But in all other situations involving evidence as to value for a particular use or purpose, different considerations apply. Theoretically there seems to be no reason why such evidence is not logically relevant, and hence admissible; but the courts which hold to the view of its inadmissibility, do so on grounds of practicability. The argument of practicability has been stated in various forms, but it always comes down, in last analysis, to the expedition of litigation and to the prevention of its undue prolongment.[14] Looked at from this viewpoint, it would seem that the exclusionary rule is too rigid, while the contrary rule goes to the other extreme, and seems to justify, in a measure, the criticism that "such evidence . . . distracts the mind of the jury from the single question of the market value".[15]

But does not the true solution lie in a middle ground between these two extremes? Why not leave it to the discretion of the trial judge as to whether such evidence ought to be admissible in any particular case? If by reason of its surroundings or its

---

[6] San Diego Land etc. Co. v. Neale, supra; Phillips v. Town of Scales Mound (1902), 195 Ill. 353, 63 N. E. 180; U. S. v. Honolulu Plantation Co. (1903), 122 Fed. 581, 58 C. C. A. 279; Lewis, Eminent Domain, 3rd ed., § 706.

[7] Port Townsend So. Pac. R. R. Co. v. Barbare (1907), 46 Wash. 275, 89 Pac. 710.

[8] Decatur v. Vaughn (1908), 233 Ill. 50, 84 N. E. 50.

[9] Brown v. Metropolitan West Side Elec. R. R. Co. (1896), 166 Ill. 434, 46 N. E. 974.

[10] In re East River Gas Co. of Long Island City (1907), 104 N. Y. Sup. 239.

[11] Gilmer v. Lime Point (1861), 19 Cal. 47.

[12] Providence and W. R. R. Co. v. City of Worcester (1891), 155 Mass. 35, 29 N. E. 56.

[13] Opelousas etc. R. R. Co. v. Bradford (1906), 118 La. 506, 43 So. 79; Brown v. Calumet River R. R. Co. (1888), 125 Ill. 600, 18 N. E. 283; Lewis, Eminent Domain, 3rd ed., § 706.

[14] Gardner v. Brookline (1879), 127 Mass. 358.

[15] Sacramento etc. R. R. Co. v. Heilbron, supra, note 5.

Digitized by Google

intrinsic characteristics, or its natural advantages, or its artificial improvements, land is peculiarly adapted to some particular use, might not this justify evidence as to value for such use? Whereas if the particular use in question be remotely prospective or speculative, or depends upon too many suppositions or hypotheses which must be realized before the contemplated use becomes practicable, then the introduction of the evidence ought not to be justified.

J. C. A.

GUARANTY: EFFECT OF EXECUTORY AGREEMENT TO GUARANTEE.—In *Postlethwaite v. Minor*[1] A, who with B was organizing a corporation, agreed in writing to "indorse and guarantee" bonds of the corporation to be issued to B. No written guarantee was in fact placed upon the bonds but they were issued to B, and by him assigned to C, who sued A as guarantor. The court held that there could be no recovery against A as guarantor. The agreement was to guarantee the bonds when issued, and, as an agreement, was binding at once, not being a mere offer; but as a guaranty it was ineffective since the parties evidently contemplated a further act, that is, writing the guaranty on the bonds themselves, and so, under the familiar rule of contracts,[2] the guaranty would not be complete until the act was done. This situation is to be distinguished from an offer to guarantee another's debt if a third person will extend credit, which is generally regarded as accepted by extending the credit requested.[3] Here B was already bound to advance his capital and the corporation to issue its bonds.

But does A escape all liability on his contract? Had B retained the bonds it is admitted that B would have had an action, either for specific performance or for damages, and it would seem to be immaterial whether he sued A as guarantor or for breach of the agreement to guarantee, the measure of damages being the same in either case.[4] But having disposed of the bonds he can show no damage for breach of the agreement, nor would he be entitled to specific performance since he no longer has an interest in the subject matter.[5] The court holds that the action must be brought on the contract of guaranty itself. C is not a party to the agreement, it was not assigned to him, nor is he entitled to sue as a third person for whose benefit the contract was made. The contract was made for B's benefit, and only incidentally, if at all, for the benefit of any stranger. C cannot claim an estoppel since B was guilty of no misrepresentation, relied on by C to his detriment. B merely failed to live up to his agreement and the terms of the agreement were perfectly plain to C.

---

[1] (July 6, 1914), 48 Cal. Dec. 75, 142 Pac. 55.

[2] Bishop v. Eaton (1894), 161 Mass. 496, 37 N. E. 665.

[3] Summers v. Mutual Life Ins. Co. (1914), 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812.

[4] Levy v. Wagner (1902), 29 Tex. Civ. App. 98, 69 S. W. 112 (agreement to indorse a note to give it security). See also Petty v. Gacking (1911), 97 Ark. 217, 133 S. W. 832, 33 L. R. A. (N. S.) 175.

[5] Crocker v. Higgins (1829), 7 Conn. 342.

Digitized by Google

The court approves the doctrine that a completed guaranty on a separate instrument would not pass without assignment. The better view seems to be that a guaranty on the obligation itself will pass without special assignment,[6] at least if the instrument be negotiable, but a guaranty on a separate instrument is generally held not to pass in this way.[7] It would seem, however, that such guaranties are intended to give security to the obligation, whether written on the instrument itself or on a separate paper, and whether the instrument be "negotiable" or not, and so are intended to inure to the benefit of any bona fide holder of the obligation. They have, in some cases, been held to pass as incidents to the obligation,[8] under the rule of equity that assignment of the debt carries with it all securities.[9] This seems to be a more reasonable view than to hold that guaranties, like warranties, are restricted to the first vendee, and must be specially assigned to pass to assignees of the debt. But, as has been shown, there was no completed guaranty in the principal case, and it is doubtful whether an executory contract to sign a guaranty can be held to be a subsisting security, and so pass with the obligation. It appears, then, that A has received his consideration, has actually, though not legally, misled the purchaser of the bonds, and still escapes liability on his contract. A possible remedy might be for B to assign to C the contract to guarantee the bonds and for C to bring his action on that agreement.

J. S. M., Jr.

HIGHWAYS: EXTENT OF POWER TO REGULATE USE BY AUTOMOBILES.—In sustaining the validity of the code section[1] requiring the driver of an automobile, or other vehicle, to stop and render assistance and give his name and license number to any person struck, or the occupants of any vehicle collided with, the District Court of Appeal for the Second District, in *People v. Diller*,[2] said that the driver of an automobile in using the highway is in the exercise of a privilege, not a right, and that the legislature may impose such conditions as it sees fit for permitting such use. To this point the court cites and approves a decision of the New York Court of Appeals.[3] In general, all vehicles have a right to use the

---

[6] Lemmon v. Strong (1890), 59 Conn. 448, 22 Atl. 293, 12 L. R. A. 270.

[7] McLaren v. Watson's Exrs. (1841), 26 Wend. 425, 37 Am. Dec. 260; but see dissenting opinion of Verplanck, Senator, for statement of the view that such guaranties should pass with the debt.

[8] Craig v. Parkis (1869), 40 N. Y 181, 100 Am. Dec. 469; Union Oil Co. v. Maxwell (1889), 33 Ill. App. 421.

[9] Hurt v. Wilson (1869), 38 Cal. 263. See also Duncan v. Hawn (1894), 104 Cal. 10, 37 Pac. 626 (statutory lien on threshing machines for labor passes to assignee of the claim).

[1] Cal. Pen. Code, § 367 c.

[2] (June 17, 1914), 18 Cal. App. Dec. 899, 142 Pac. 797.

[3] People v. Rosenheimer (1913), 209 N. Y. 115, 102 N. E. 530, 46 L.

Digitized by Google

highway, regardless of novelty, or possible inconvenience to existing means of transportation,[4] but this right is qualified by the similar rights of others,[5] and is subject to reasonable regulations imposed by proper authority.[6] Automobiles have been held not to be "dangerous instrumentalities", operated only at peril,[7] but exclusion from particular roads or districts has been upheld in a number of cases on account of dangers which would arise from their use.[8] Exclusion from the roads of an entire province was upheld in a Canadian case,[9] but this case can probably be distinguished on account of the greater freedom given to legislatures under the English system, if not by reason of particular dangers from the use of automobiles on the roads of Prince Edward's Island. A California case[10] went rather far in upholding the validity of a county ordinance excluding automobiles from the highways at night, the court taking judical notice of the tendency of such machines to frighten horses, but even here it was said, "if the use of automobiles gradually becomes more common, there may come a time when an ordinance like the one here in question would be unreasonable". It would seem that any general exclusion of automobiles would now be unreasonable, in view of the fact that there are well over one hundred thousand of them in operation in California, and the ample provisions, when used, for their safe operation. The code section may be upheld as a reasonable and proper measure for the protection of travellers against reckless driving.[11] It applies to all vehicles and so, if invoked against the driver of a horse-drawn vehicle, it certainly could not be supported on the ground of tolerated use, but must rest on some such ground

---

R. A. (N. S.) 977, reversing the Supreme Court, in 130 N. Y. Supp. 544, 146 App. Div. 875, a majority of which court held that a similar statute was opposed to the constitutional privilege from self incrimination. The court, in the principal case, declined to pass on this point, no question of criminal negligence in connection with the accident being involved. See also, Ex Parte Kneedler (1912), 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, also cited with approval in the principal case.

[4] Christy v. Elliott (Ill., 1905), 1 L. R. A. (N. S.) 215, n; Macomber v. Nichols (1876), 34 Mich. 212, 22 Am. Rep. 522.

[5] McIntyre v. Orner (1906), 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130.

[6] Prim v. Jones (1895), 11 Utah 200, 39 Pac. 825, affirmed by the United States Supreme Court in 165 U. S. 180, 41 L. Ed. 677, 17 Sup. Ct. Rep. 286.

[7] Steffen v. McNaughton (1910), 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382.

[8] Com. v. Kingsbury (1908), 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513; State v. Mayo (1909), 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502 and note; State v. Phillips (1910), 107 Me. 249, 78 Atl. 283.

[9] In Re Rogers (1909), 7 East Law Rep. (Can.) 212, 15 Ann. Cas. 1167.

[10] In Re Berry (1905), 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

[11] Hall v. Compton (1908), 130 Mo. App. 675, 108 S. W. 1122; Christy v. Elliott (Ill., 1905), 1 L. R. A. (N. S.) 215, n.

Digitized by Google

as suggested above. It seems a rather dangerous doctrine to extend the police power to an unnecessary degree by holding that a now common means of transportation can be excluded from the highways. This might easily be made the entering wedge for a further extension of this already extensive power to a minute regulation and even extinction of lawful occupations, and the breaking down of the constitutional guarantees of liberty and property under the guise of public protection.

J. S. M., Jr.

JURISDICTION OF A COURT OF PROBATE IN GRANTING LETTERS OF ADMINISTRATION.—In *Estate of Daughaday*[1] the court sitting in probate in determining its jurisdiction to grant letters of administration states the rule to be that if a non-resident leaves no estate in the county in which letters of administration are petitioned for there is no reason for issuance of such letters. The majority of jurisdictions seems to be in accord with this view that the interest of a non-resident decedent must at least appear to have some value in order to give a court jurisdiction for granting letters of administration. As to what constitutes assets, it has been held that an equitable claim is sufficient;[2] to the same effect, a right of action for negligent injury causing death,[3] an interest in an action at law[4] and the mere fact that a claim is doubtful or even unenforceable is immaterial[5] as the validity is not a question for a court of probate to decide, but the court, exercising its discretion, may deny letters where the claim is not of reasonable or colorable value.[6]

If the decedent is a resident in or an inhabitant of the county in which letters are petitioned for, in the absence of statutory requirement, the possession of an estate is not a jurisdictional prerequisite to the appointment of an administrator even where the applicant is merely a creditor.[7] In Watson v. Collins' Adm'r[8]

---

[1] (June 20, 1914), 47 Cal. Dec. 736, 141 Pac. 929.

[2] Estate of Daughaday, supra, note 1.

[3] Missouri Pac. R. R. Co. v. Lewis (1888), 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67.

[4] Murphy, Neal & Co. v. Creighton (1876), 45 Iowa 179.

[5] Sullivan v. Fosdick (1877), 10 Hun. 173; Parsons v. Spaulding (1880), 130 Mass. 83.

[6] Estate of Daughaday, supra, note 1.

[7] Holburn v. Pfanmiller's Adm'r. (1903), 114 Ky. 831, 71 S. W. 940.

[8] (1861), 37 Ala. 587. See also, Wheat v. Fuller (1887), 82 Ala. 572, 2 So. 628; Duff v. Duff (1886), 71 Cal. 513, 521, 12 Pac. 570; Contra, In re Murray (1878), Myr. Prob. (Cal.), 208; Flood Adm'r v. Pilgrim (1873), 32 Wis. 376; Merriweather v. Kenard (1874), 41 Tex. 273. As against collateral attack it would seem that the grant of letters of administration is conclusive, Irwin v. Scriber (1861), 18 Cal. 499; Connors v. Cunard S. S. Co. (1910), 204 Mass. 310, 90 N. E. 601; Andrews v. Avory (1858), 14 Gratt. 229, 73 Am. Dec. 355, except, of course, as to the fact of death, Stevenson v. Superior Court (1882), 62 Cal. 60.

Digitized by Google

the court said that only when the testator resides outside the state at the time of his death are assets necessary for granting letters of administration. The question may arise as one of practical importance where a resident has died and left no property or rights which may be ascertained by the court even to make a prima facie showing of assets, as for example, the deceased may be a mortgagee of real estate fully paid but not discharged upon the record, or a creditor may believe there are hidden assets. The following language of Mr. Justice Gray in Pinney v. McGregory,[9] seems to indicate that a court of probate will always grant such letters where administration is either necessary, or advisable or desirable: "To limit the power of granting administration to cases in which the goods are or the debtor resides in the Commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another state, all remedy whenever goods are brought into this state, or a debtor takes up his residence here, after the death of the intestate." The reasoning of the cases seems to establish clearly that if the decedent resides in the jurisdiction it is not necessary to inquire whether there is property, and that even though the decedent is a non-resident a court may grant letters if there is a valid purpose to be served other than the distribution of assets.

C. R. S.

MASTER AND SERVANT: INTERFERENCE BY THIRD PERSONS: LAWFULNESS OF LABOR UNIONS.—Under what circumstances are the activities of a labor union lawful when they result in the severance of the relationship of master and servant? This question is brought up in the case of *Mitchell v. Hitchman Coal Company.*[1] The coal company ran a non-union mine, contracting with its employees not to hire union men, the employees in turn contracting, individually, that they were non-union men, and that if they should join any union they would withdraw from the company's employ. The Federal District Court for West Virginia held that the officials of the United Mine Workers of America could not be enjoined from inducing these employees by peaceable persuasion to join the union, although thereby the relation of master and servant was severed.

It is settled law that one who knowingly induces the breach of a subsisting contract of employment, unless he has legal justification,[2] is guilty of an actionable wrong.[3] But it is not necessary

---

[9] (1869), 102 Mass. 186, 193.

[1] (May 28, 1914), 214 Fed. 662.

[2] Wharton v. Jossey (1872), 46 Ga. 578.

[3] Lumley v. Gye (1853), 2 El. & Bl. 216; Walker v. Cronin (1871), 107 Mass. 555; Haskins v. Royster (1874), 70 N. C. 601, 16 Am. Rep. 780; Flaccus v. Smith (1899), 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; Brown Hardware Co. v Indiana Stoveworks (1903),

Digitized by Google

that there be a contract, or a fixed term of employment; there may be a contract voidable at will, or a service from day to day, so that either party may lawfully break off the relationship. In this latter case, it is equally well-settled law that one who has knowledge of the relationship,[4] and yet who maliciously, that is, without justifiable cause,[5] brings about its severance, to the actual injury of the plaintiff,[6] is liable to an action by the party injured.[7]

The same principles apply to labor unions. They have no better right than have individuals to induce the breaking of contracts, or to persuade, without legal justification, employees to quit their service. Hence, it follows, and the principal case so holds, that a labor union may call strikes and induce workmen to leave their service, provided:

1. That no contract is thereby broken.[8] It is to be noted that no contract was broken in the principal case. The men did not contract not to join a union, but simply that if they did so, they would leave the company's employ.[9]

2. That both their general and immediate purposes be lawful. Though there are numerous expressions in the cases to the contrary,[10] it is now held by abundant authority that a labor union, organized to advance the welfare of its members and of workingmen in general, in competition with capital, is pursuing a lawful

---

96 Tex. 453, 73 S. W. 800; Employing Printers' Club v. Dr. Blosser Co. (1905), 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, accord. Boulier v. Macauley (1891), 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550; Boysen v. Thorn (1893), 98 Cal. 578, 33 Pac. 592, contra.

[4] Butterfield v. Ashley (1850), 6 Cush. 249; Clark v. Clark (1899), 63 N. J. Law 1, 42 Atl. 770.

[5] Chipley v. Atkinson (1887), 23 Fla. 201, 1 So. 934, 11 Am. St. Rep. 367; Employing Printers' Club v. Dr. Blosser Co., supra, note 3; Globe and Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co. (1910), 1 So. 454.

[6] Bird v. Randall (1762), 3 Burr. 1352; Chipley v. Atkinson (semble), supra, note 5.

[7] Chipley v. Atkinson, supra, note 5; Frank v. Herold (1901), 63 N. J. Eq. 443, 52 Atl. 152; Employing Printers' Club v. Dr. Blosser Co. (semble), supra, note 3; Thacker Coal and Coke Co. v. Burke (1906), 59 W. Va. 253, 53 S. E. 161, 5 L. R A. (N. S.) 1091.

[8] See cases, note 3.

[9] Query: what is the effect of a contract by the employee with his employer not to join a union? If it is for a fixed period, irrespective of employment, it would be against public policy. If only during an employment which is from day to day, it would avail the employer nothing, for the employee might leave at any time, and then join a union without breaking his agreement not to do so. But it is probable that, if there were a fixed term of employment, and an agreement by the employee that he would not join a union during that period, a union inducing such employee to join the union and break his contract would be guilty of an actionable wrong.

[10] Old Dominion Steamship Co. v. McKenna (1887), 30 Fed. 48; Vegelahn v. Guntner (1897), 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722; Frank v. Herold (1902), 63 N. J Eq. 443, 52 Atl. 152.

Digitized by Google

purpose.[11] It is this lawful purpose which gives the union the necessary legal justification.

3. That it employ no unlawful means, such as force, threats, or coercion.[12] It is well-settled that peaceable persuasion directed to persons willing to listen (which was the only means adopted in the principal case) is a lawful means.[13]

H. J. W.

MUNICIPAL CORPORATIONS: OPERATION OF WATER SYSTEM BY MUNICIPALITY: UNREASONABLE REGULATION.—The city of Los Angeles by article one, section seven of its charter is given the power "to provide for supplying the city and its inhabitants with water", and by article eighteen, section one hundred and ninty-two, the power to fix rates by ordinance is given it. The city in exercising this power passed an ordinance providing that "All water rates shall be charged against property on which it is furnished and against the owner thereof, and if for any cause any sums owing therefor become delinquent the water shall be cut off, and in no case shall it be turned on to the same property until all such delinquencies shall have been paid in full. No change of ownership or occupation shall affect the application of this section."

In *Nourse v. City of Los Angeles*[1] the power of the city to pass the ordinance was decided in the negative. The court holds that a municipality in operating a water system for the purpose of supplying its inhabitants with water acts not in its governmental and sovereign capacity as an agent of the state, but in its proprietary capacity, engaged in a service for its profit, although the public may be incidently benefited. Acting in such capacity a city is governed by the same rules that apply to any private corporation in a like occupation. This has been repeatedly held.[2]

---

[11] Commonwealth v. Hunt (1842), 4 Met. 111; State v. Stewart (1887), 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; Rogers v. Evarts (1891), 17 N. Y. Sup. 264; Jordahl v. Hayda (1905), 1 Cal. App. 696; Pickett v. Walsh (1906), 192 Mass. 572, 78 N. E. 753; Parkinson v. Building Trades Council (1908), 154 Cal. 581. It must be remembered that, though the general purpose of a union may be lawful, its immediate purpose may be unlawful (Employing Printers' Club v. Dr. Blosser Co., supra, note 3), in which case it will make itself legally liable to an injured employer.

[12] Old Dominion Steamship Co. v. McKenna, supra, note 10; State v. Stewart, supra, note 11; Vegelahn v. Guntner, supra, note 10; Frank v. Herold, supra, note 10; Jordahl v. Hayda, supra, note 11.

[13] Rogers v. Evarts, supra, note 11; Karges Furniture Co. v. Amalgamated Woodworkers (1905), 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Pierce v. Stablemen's Union (1908), 154 Cal. 581, 98 Pac. 1027; Jones v. Maher (1909), 116 N. Y. Sup. 180.

[1] (Sept. 8, 1914), 19 Cal. App. Dec. 329.

[2] South Pasadena v. Pasadena Land and Water Co. (1908), 152 Cal. 579, 93 Pac. 490; Wagner v. City of Rock Island (1893), 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; 1 Dillon Mun. Corp. 27; City of Montgomery v. Green (Ala., 1913), 60 So. 900; People v. Schlitz Brewing Co. (Ill., 1913), 103 N. E. 555.

Digitized by Google

The principle is especially illustrated in cases holding a municipality liable for injuries occasioned to persons by negligence in the unskillful operation or construction of its water system.[3] Water rates are not then taxes[4] for which the property is liable, but are charges for the water supplied: and regulations governing them must be non-discriminatory and reasonable. Therefore an ordinance such as the above cannot be passed making the occupier liable for all delinquent bills of a past occupier, unless the power to make such charge a lien on the land has been conferred by a general statute of the state or by the city charter itself.[5] The case in comment then seems to express the universal rule.

The court further says "the authority to enact the provision under discussion if it exists at all is by virtue of the general incidental power of the municipality". There appears to be no case where such a power has been implied and it is a question whether on principle it could be implied.[6] There is no common law liability for a property holder to pay the personal debts of a past holder as a condition precedent to a supply of gas or water. Unless the legislature of the state expressly empowers the city to make such charges a lien on the land, it would seem no such ordinance could be passed.[7]

L. C.

MUNICIPAL CORPORATIONS: RAILROAD COMMISSION: REGULATION OF UTILITIES.—Water companies supplying the city of Glendale made a rule requiring each consumer to pay fifteen dollars for installing a meter and making service connections between their water mains in the street and the premises of the

---

[3] Bailey v. City of New York (1842), 3 Hill 531, 38 Am. Dec. 669; City of Yslita v. Babbitt (1894), 8 Tex. Civ. App. 432, 28 S. W. 702; Davoust v. City of Alameda (1906), 149 Cal. 69, 84 Pac. 760. But a city is not liable for damages caused by fire in consequent of its negligent failure to maintain sufficient water works. Springfield Fire Ins. Co. v. Village of Keesville (1895), 148 N. Y. 46 N. E. 405.

[4] City of Chicago v. Northwestern Mut. Life Ins. Co. (1905), 218 Ill. 40, 75 N. E. 803. See also Town of Ukiah City v. Ukiah Water and Imp. Co. (1904), 142 Cal. 173, 75 Pac. 773.

[5] Linne v. Bredes (1906), 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068; Turner v. Revere Water Co. (1898), 171 Mass. 329, 50 N. E. 634; City of Chicago v. Northwestern Mut. Life Ins. Co. (1905), 218 Ill. 40, 75 N. E. 803; City of Houston v. Lockwood Inv. Co. (Tex., 1912), 144 S. W. 685; Cuba v. Druskin (1909), 120 N. Y. Sup. 381, 135 N. Y. App. Div. 508. In City of Atlanta v. Burton (1892), 90 Ga. 486, 16 S. E. 214, the court says, "The charter did not intend or contemplate that water should be furnished on individual or personal credit, but that the supply should be made a charge on the property to which the water was conveyed."

[6] "Whenever a by-law seeks to alter a well settled principle of common law, or to establish a rule interfering with the right of an individual or the public, the power to do so must come from plain and direct legislative enactment." Long. v. Taxing District (1881), 7 Lea. 134, 40 Am. Rep. 55.

[7] Farmer v. Mayor of Nashville (Tenn., 1913), 156 S. W. 189.

Digitized by Google

consumer. On application of the city the Railroad Commission of California made an order directing the water companies to abrogate their rule and to install meters and make connections without cost to the consumer. This order was reviewed, on petition of the water companies, by the Supreme Court in the case of *Title Guarantee & Trust Company and Miradero Water Company v. Railroad Commssion.*[1]

The state constitution declares that the right to collect rates for water supplied to a city is a franchise,[2] and that persons and corporations may establish and operate water works under such regulations as the city may prescribe in its organic law.[3] And the Civil Code provides that no corporation formed to supply a city with water may do so unless authorized by the organic law of the city, and in accordance with a contract entered into between the city and the corporation.[4]

Under these provisions of the law, it has been held that water companies conduct their business by virtue of franchises granted by public authority, and are, therefore, subject to all the incidents arising from the relations thereby established.[5]

Again, the Civil Code provides that water companies must supply fresh water to the inhabitants of the city they are established to serve at reasonable rates, without discrimination, and on proper demand, and that the city authorities may prescribe proper rules relating to the delivery of water, not inconsistent with the general laws.[6] The Supreme Court, in the principal case, construing this provision, applies to California a well-established rule,[7] that under their franchises water companies must deliver water to the consumer at his premises, and to do so must lay service pipes without cost to the consumer.

Thus far the Supreme Court and the Railroad Commission are in agreement, and the water companies' charge of fifteen dollars for installing meters and making service connections must be considered illegal. But on the question of the jurisdiction of the Railroad Commission, the Supreme Court takes an adverse view. The question was whether Glendale, as a city of sixth class possessed the power, prior to October 10, 1911, the date of the adoption of the constitutional amendment giving the Railroad Commission authority over public utilities, to regulate water companies with respect to their operations and service within the city, and there-

---

[1] (Aug. 3, 1914), 48 Cal. Dec. 171; and on rehearing, (Sept 2, 1914), The S. F. Recorder, Sept. 4, 1914, p. 8, 48 Cal. Dec. 189.

[2] Cal. Const., art. xiv, §2.

[3] Cal. Const., art. xi, § 19.

[4] Cal. Civ. Code, § 548.

[5] In re Russell (1912), 163 Cal. 668, 126 Pac. 875, and cases there cited.

[6] Cal. Civ. Code, § 549.

[7] Hatch v. Consumers' Co. (1909), 17 Idaho 204, 104 Pac. 670; Consumers' Co. v. Hatch (1912), 224 U. S. 148.

Digitized by Google

under to make such an order as that made by the commission. If it had such power prior to October 10, 1911, the court holds that it was excepted from the jurisdiction of the commission, except by vote of the electors of the city. The court, in brief, holds (1) that, under section nineteen of article eleven, and section one of article fourteen of the constitution, giving authority to fix rates, the city may require the installing of meters by the company as a proper means of measurement of water consumed;[8] and (2) that, under section five hundred and forty-nine of the Civil Code, authorizing the city to "prescribe proper rules relating to the delivery of water", the city could impose upon the company the duty of bearing the expense of laying the pipes necessary for such delivery. The court gives no authorities for this construction of section five hundred and forty-nine of the Civil Code. It is a welcome enough decision, and there is no disposition to find fault with it, but the laws can hardly be regarded as settled with only the brief consideration given thereto.

After coming to this conclusion, the court proceeded, on the first hearing of the case to reenforce its position by considering the applicability of section eleven, of article eleven, which reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

On rehearing the court withdrew all that portion of its opinion, more than half thereof, which related to this provision of the state constitution. It would seem, however, that much of the force of the court's ruling that the city of Glendale possessed the power, and that the Railroad Commission, therefore, did not possess the power to direct the water company to lay service pipes without charge to the consumer, depended upon its interpretation of the authority conferred by this provision of the constitution.

Very briefly it may be stated why the construction of section eleven of article eleven given by the court seems improper. This section has always been considered highly important. It is a grant of the police power to counties and to cities,[9] and the police power is held to be limited to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect or preserve, the public health, morals and safety, or the general welfare.[10] And it is held to grant nothing more than what may be included under the term police regulations.[11] But in the principal case, the court says: "There is nothing in section eleven

---

[8] Citing Spring Valley W. W. v. San Francisco (1880), 82 Cal. 286, 22 Pac. 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

[9] Denton v. Vann (1908), Cal. App. 677, 97 Pac. 675; In re Ackerman (1907), 6 Cal. App. 5, 91 Pac 429; In re Pfahler (1906), 150 Cal. 71, 88 Pac. 270.

[10] Ex parte Quarg (1906), 149 Cal. 79, 84 Pac. 766.

[11] Ex parte Hodges (1890), 87 Cal. 162, 25 Pac. 277.

Digitized by Google

limiting it to regulations for the preservation or promotion of the public health, public morals, or the public use of the streets."[12] This view is undoubtedly correct according to the better interpretations of what constitutes the police power.[13] The court continues: "The relations of a public utility engaged in public service for the inhabitants of a city to the inhabitants they serve and the exactions and charges they make or the conveniences they afford to such inhabitants, are clearly matters within the domain of municipal affairs for the care of which the city was organized. (Home T. & T. Co. v. Los Angeles, 155 Fed. 564, S. C. 211 U. S. 265.)" The Federal Circuit Court, however, in the case here cited, was construing the phrase "municipal affairs" as used in section six of article eleven of the California constitution, and very properly held that the relations of a public utility to the city it was created to serve might be regulated by the city under the right authorization. And, it is submitted, "municipal affairs", as used in section six are not to be confounded with "police regulations" as used in section eleven. Matters pertaining to the police power may be municipal affairs[14] but do all "municipal affairs" fall within the police power so far as it is conferred by section eleven of article eleven?[15]

Without discussing the authorities, which certainly seem to hold that the powers in question do not fall under a general grant of the police power, but must otherwise be conferred,[16] the principle favored by the court in the now expunged portion of the original opinion would seem to obliterate the line of distinction between the "municipal affairs" of section six and the "police regulations" of section eleven. Of course, "municipal affairs", in the sense of section six, must be specifically provided for either by the municipal charter or by general law.[17]

W. C. J.

NEGLIGENCE: EXCEEDING SPEED LIMIT: NELIGENCE PER SE.—With the decision of the Supreme Court of Washington in the case of *Anderson v. Kennear*[1] another jurisdiction has taken the unqualified position that the violation of a city ordinance or state law is negligence *per se*. In a suit for damages it was proved

---

[12] 48 Cal. Dec. 171, 178.

[13] Mutual Loan Co., Martell (1911), 222 U. S. 225, 55 L. Ed. 175, 32 Sup. Ct. 74.

[14] People v. Williamson (1902), 135 Cal. 415, 67 Pac. 504 (Mr. Justice Temple's opinion).

[15] See 1 Cal. Law Rev. 132.

[16] City of St. Louis (1888), 96 Mo. 623, 10 S. W. 197; In re Pryor (1895), 55 Kan. 724, 41 Pac. 958; State v. M. & K. Tel. Co. (1905), 189 Mo. 83, 88 S. W. 41; Jacksonville v. Southern Bell Tel. and Tel Co. (1909), 57 Fla. 374, 49 So. 509; Bluefield Water Works & Imp. Co. v. City of Bluefield (1911), 69 W. Va. 1, 70 S. E. 772; Dillon, Mun. Corp., 5th ed., p. 2230.

[17] Fragley v. Phelan (1899), 126 Cal. 383, 58 Pac. 923.

[1] (July 27, 1914), 141 Pac. 1151.

Digitized by Google

that the defendant, while driving his automobile at the rate of twenty-four miles an hour through the streets of Tacoma, ran over and injured the plaintiff. Twelve miles an hour within the city is the limit fixed by law. The trial judge instructed the jury that if they found from the evidence that the defendant was exceeding the speed limit, and that such violation of the law was the proximate cause of the injury to the plaintiff and that the plaintiff was himself free from contributory negligence, then their verdict should be for the plaintiff. On appeal it was held by the Supreme Court that the instruction as given was a correct statement of the law in Washington, that is that the violation of an ordinance is negligence *per se*, where such violation is the proximate cause of the injury.

The law in California on this point is well settled and is clearly in accord with the rule just enunciated by the Washington court.[2] The same rule has been laid down as law in many other jurisdictions,[3] while in some it has been held that the violation of an ordinance or statute is not negligence as a matter of law but only "some evidence of negligence".[4]

It seems, however, that both of these rules go to extremes and do not state the law as it should be. A better rule would be that the violation of a law or ordinance, if left without explanation or excuse, is presumptive proof of negligence, that is, it establishes a prima facie case,[5] but it may be excused by other evidence, including all the surrounding circumstances. In a case where the charge is one of negligence, if the defendant can show that as a matter of fact he was not negligent toward the plaintiff even though he was violating the law at the time of the injury, the defendant should not be charged. But if he cannot rebut this presump-

---

[2] Siemers v. Eisen (1880), 54 Cal. 418; McKune v. S. C. V. M. & L. Co. (1895), 110 Cal. 480, 42 Pac. 980; Fenn v. Clark (1909), 11 Cal. App. 79, 103 Pac. 944; Bauhofer v. Crawford (1911), 16 Cal. App. 676, 117 Pac. 931; Stein v. United R. R. of San Francisco (1911), 159 Cal. 368, 113 Pac. 663; Scragg v. Sallee (Cal. App., 1914), 140 Pac. 706.

[3] Western etc R. Co. v. Young (1888), 81 Ga. 397, 7 S. E. 912; Indiana, etc., R. Co. v. Barnhart (1888), 115 Ind. 399, 16 N. E. 121; Bott v. Pratt (1885), 33 Minn. 323, 23 N. W. 237; Smith v. Milwaukee Builders' etc., Exch. (1895), 91 Wis. 360, 64 N. W. 1041; Keim v. Union R. Co. (1886), 90 Mo. 314, 2 S. W. 427; Platte etc., Canal Co. v. Dowell (1892), 17 Colo. 376, 30 Pac. 68; Huston etc., Ry. Co. v. Wilson (1883), 60 Tex. 142; Linder v. Railroad Co. (1910), 84 S. C. 536, 66 S. E., 995; Smith v. Wolf (Ala., 1909), 49 So. 395; Vandeveer v. Moran (Neb., 1907), 112 N. W. 581.

[4] Knupfle v. Knickerbocker Ice Co. (1881), 84 N. Y. 488; McRickard v. Flint (1889), 114 N. Y. 222, 21 N. E. 153; Chrystal v. Troy etc. R. Co. (1891), 124 N. Y. 519; Connor v. Electric Traction Co. (1896), 173 Pa. St. 602, 34 Atl. 238; Street's Sherman & Redfield on Negligence, 6th ed., vol. 1, p. 26.

[5] O'Donnell v. Riter-Conley Mfg. Co. (1906), 124 Ill. App. 544; Field v. Gowdy (1908), 199 Mass. 568, 85 N. E. 884; Street's Sherman & Redfield on Negligence, 6th ed., vol. 1, p. 54.

Digitized by Google

tive evidence he should be held liable; given always that the violation of the law was the direct and proximate cause of the injury.

J. B. O.

PAROL EVIDENCE RULE: INCOMPLETENESS NOT APPEARING ON THE FACE OF THE INSTRUMENT.—In *United Iron Works v. Outer Harbor Dock & Wharf Company,*[1] a long contract for the construction of a dredge was held not to contain an express or implied warranty of capacity for certain work. It was further rightly held that such a warranty could not be added by parol. It is suggested, however, that the following language of the court on the parol evidence rule is inconsistent with sound principle:

"This rule of evidence is invoked and employed only in cases where upon the *face of the contract* itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said but by showing what they meant by what they said." (italics ours)

The incompleteness of a contract does not necessarily have to appear on its face. Until evidence of the surrounding circumstances is given, the court is not in a position to know whether the contract is complete or not. In every contract involving a technical subject matter, difficulties likely to arise in the performance, and other points to be covered, suggest themselves to those of practical experience in the business, but never occur to one not so acquainted. When this evidence is introduced a written contract that appeared complete on its face may turn out to cover very few of the matters really involved and the conclusion is irresistible that the parties did not intend to embody their entire agreement in the writing, but did intend to leave much to custom and oral understanding. This is not varying the contract by parol. It is merely determining the preliminary question whether the parties intended the writing to be the only evidence of their agreement. To decide this question properly the court must have before it the actual situation of the parties. Any other view attributes to the court an *a priori* omniscient understanding of the practical operation of every kind of business. The better rule was laid down by the District Court of Appeal in Luitweiler etc. Co. v. Ukiah etc. Co.,[2] but the Supreme Court, however, withheld assent from this portion of the opinion, and by its language in the principal case repudiates it. It became necessary therefore to overrule Snyder v. Holt Mfg. Co.,[3] whereas under the true rule the completeness of a written contract is a question of fact under all

---

[1] (June 26, 1914), 48 Cal. Dec. 9, 141 Pac. 917.

[2] (1911), 16 Cal. App. 198, 116 Pac. 707; see also, Wheaton v. Noye Mfg. Co. (1896), 66 Minn. 156, 68 N. W. 854; Stephen, Digest of the Law of Evidence, art. 90; Cal. Civ. Code, § 1647; Cal. Code Civ. Pro. § 1860.

[3] (1901), 134 Cal. 324, 66 Pac. 311.

Digitized by Google

the circumstances of the particular case, a question not reducible to exact precedent.

A. M. K.

PUBLIC LANDS: SWAMP AND OVERFLOWED LANDS: TITLE BY LISTING IN CALIFORNIA.—The plaintiff in *Sawyer v. Osterhaus*,[1] who failed to sustain his title to swamp lands by relying on the act of 1850 and parol evidence to prove its character, may have overlooked a method of acquiring title that is unique to California.

By the act of 1850 or the Arkansas Act[2] as it is called, Congress gave the states on compliance with certain requirements, all the swamp lands within their borders. The many cases[3] holding this act vested title in the states immediately, have been overruled. The ground of these later decisions[4] is that the fee remains in the federal government until a patent is issued to the state or individual. There is one exception to this universal rule. To understand this, it is necessary to go back to early California days.

On the acquisition of the present territory of California the proprietary title as well as the fee in all the public lands within its limits passed at once to the United States. Thus the federal government obtained title to some two million acres of swamp land. The early reclamation of these lands was essential, not only on account of their extraordinary fertility when reclaimed, but also for the reason that they were the cause of malarial fevers and disease. So Congress passed the law of 1850, which proved woefully inadequate. The chief cause of complaint was the delay of the interior department in making out and certifying the lists required, before patents could be issued. Great inconvenience was caused in this state as the heavy immigration of 1850 and the years following caused a large demand for lands of this character.

In an effort to remedy this, the legislatures of several states in which swamp lands existed, including California,[5] attempted to identify and dispose of the lands, passing acts for their survey and sale and the issuance of patents therefor. Conflicts immediately arose between the parties claiming under the state and those claiming directly from the United States. This finally led to the

---

[1] (February 7, 1914), 212 Fed. 765.

[2] 9 Stat. at L. 520, ch. 84; 1901 U. S. Comp. St. 1586.

[3] Summers v. Dickinson (1858), 9 Cal. 554; Owens v. Jackson (1858), 9 Cal 322; Kernan v. Griffith (1864), 27 Cal. 87; 9 Opinions Attys. Gen. 254; Lux v. Haggin (1886), 69 Cal. 255, at 340, 10 Pac. 674; People ex rel Pierce v. Morrill (1864), 26 Cal. 336.

[4] Rogers' Locomotive Works v. Emigrant Co. (1896), 164 U. S. 559, 41 L. Ed. 552, 17 Sup. Ct. 188; Brown v. Hitchcock (1899), 173 U. S. 473, 43 L. Ed. 772, 19 Sup. Ct 485; McCormick v. Hayes (1895), U. S. 332, 40 L. Ed. 171, 16 Sup. Ct. 37; Chapman & Dewey Lumber Co. v. St. Francis Levee District (1914), 232 U. S. 186, 34 Sup. Ct. Rep. 297.

[5] 1855 Stat. Cal. 189; 1863 Stat. Cal. 591.

Digitized by Google

passage by Congress of the act of 1866[6] entitled "An act to quiet land titles in California", by which the provisions of the act of 1850 were changed in their application to California. The identification of swamp lands was no longer left to the Secretary of the Interior, but to the joint action of the state and the federal authorities.

This mutual action results in the certification of title from the federal government to the state. From this time on the swamp land takes the character of other land within the state and is subject to its jurisdiction. Confirmation by patent from the United States is not necessary under the act of 1866, as listing and identification alone is sufficient.[7] The courts have come to the conclusion that the correct rule for the act of 1850 is, that the legal title passes only upon issuance of United States' patent, that when the lands are identified as swamp lands and not before, the state or its grantee is entitled to a patent therefor. On the issuance of this patent, what was previously an equitable title, becomes a perfect legal title in fee simple. Under the act of 1866, the title by state grant that vests would seem to be a legal rather than an equitable one. So had the plaintiff brought his case under the provisions of this act his lack of a federal patent ought not to have been material.

L. G.

---

[6] 14 Stat. at L. 218, ch. 219.

[7] Wright v. Roseberry (1887), 121 U. S. 488, 30 L. Ed. 1039, 7 Sup. Ct. 985; Tubbs v. Wilhoit (1891), 138 U. S. 134, 34 L. Ed. 887, 11 Sup. Ct. 279; 2 Dec. Dept. Int. Public Lands 652.

Digitized by Google

Book Reviews

AFTER DINNER SPEECHES AND HOW TO MAKE THEM. By William Allen Wood. T. H. Flood & Co., 214 W. Madison St., Chicago, Ill. 1914. pp. 384. $2.15.

This volume should be of interest to lawyers. Not only is the profession liberally represented in the speakers selected by Mr. Wood as masters of the art, but many of the speeches printed in the collection illuminate phases of the law. The address of Mr. Choate at a dinner of the Chicago Bar Association upon "Our Profession—The Law", should alone entitle the volume to a place upon the shelves of the lawyer whose interest in his calling extends beyond its mechanical side. Unlike conversation, which De Quincey years ago thought was a dead art, after dinner speaking seems to be a very live one. Most of Mr. Wood's selections are from contemporaries. The speakers and subjects cover a wide field, from Mr. George Ade on the "Hoosier Abroad" to President Wilson on "Standards of Leadership".

The number of diplomatists represented in the volume forces upon the curious reader's mind the intimate connection between diplomacy and dining. Lowell, Hay, Reid, Choate, Page, Parker, Van Dyke, Bryce, Jusserand, Root, Palmerston, who are all represented in the present collection,—how much of that international public opinion, which in spite of the present European catastrophe, has such permanent importance in the civilized world and which is destined to have even more importance in the future, is the result of the tact and social genius of these men, the great exemplars of this art.

Mr. Wood's omissions are as significant as his inclusions. We look in vain for Webster or Gladstone, for Bryan or Lloyd George in this collection. For well-fed and self-satisfied audiences, their strain is too heroic.

University of California men, especially of the early nineties, will welcome the inclusion of Frank Norris' rhymed toast at a "Fiji" dinner.

O. K. M.

WHERE THE PEOPLE RULE, OR THE INITIATIVE AND REFERENDUM, DIRECT PRIMARY LAW AND THE RECALL IN USE IN THE STATE OF OREGON. By Gilbert L. Hedges. Bender-Moss Company, 11 City Hall Ave., San Francisco, Cal. 1914. pp. vii, 214.

This book will be found very serviceable. In Oregon it would seem to be of indispensable value. In other states, where these modern devices of popular government are in existence or their

Digitized by Google

adoption is impending or being agitated, this volume will be especially helpful. In the first chapter the texts of the constitutional provisions for the Initiative and Referendum are given. In the second chapter judicial interpretation of these provisions is discussed, and in the third chapter their practical working is described. Chapter four is devoted to the consideration of the Direct Primary Law, and chapter five to that of the Recall. In chapter six the author devotes a few pages to an expression of his opinion on the general operation of the several measures. The value of the book is enhanced by several appendices, including the text of the Constitution of the State of Oregon.

Both lawyer and layman, both advocate and opponent of these popular measures of government, will find the volume useful and instructive.

W. C. J.

Books Received

AN INTRODUCTION TO THE HISTORY OF THE DEVELOPMENT OF LAW. By Hon. M. F. Morris. John Byrne & Co., 1333 F St. N. W., Washington, D. C. 1911. pp. 315. $2.00.

A TREATISE ON THE LAW OF NATIONAL AND STATE BANKS. By H. W. Magee. Second Edition. Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1914. pp. lvii, 1159. $7.50.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By Wm. Miller Collier. Tenth Edition by Frank B. Gilbert. Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1914. pp. lxxxi, 1513. $9.00.

ESSAYS POLITICAL AND HISTORICAL. By Charlemagne Tower. J. B. Lippincott Co., Washington Square, Philadelphia, Pa. 1914. pp. 306. $1.50.

THE MECHANICS OF LAW MAKING. By Courtenay Ilbert. Columbia University Press, 30-32 W. 27th St., New York. 1914. pp. viii, 209. $1.50.

FOREIGNERS IN TURKEY, THEIR JURIDICAL STATUS. By Philip Marshall Brown. Princeton University Press, Princeton, New Jersey. 1914. pp. vii, 157. $1.25.

THE DOCTRINE OF JUDICIAL REVIEW, ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS. By Edward S. Corwin. Princeton University Press, Princeton, New Jersey. 1914. pp. vii, 177. $1.50.

THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA. By Cardinal Goodwin. The Macmillan Company, 64-66 Fifth Avenue, New York. 1914. pp. xiv, 359. $2.00.

OPEN AIR POLITICS. By Junius Day. Houghton Mifflin Company, 4 Park St., Boston, Mass. 1914. pp. 236. $1.25.

Digitized by Google

California Law Review

Volume III. JANUARY, 1915 Number 2

Reorganization of State Administration in California.

IT IS becoming more and more clear to the popular judgment that the organization of the administrative branch in American state government rests on an unscientific basis and suffers from unfortunate traditions. In several states commissions are at work to investigate and report changes. Governors' messages complain of the lack of unity and responsibility in the execution of business entrusted to their care. The creation of "Boards of Control" is one attempt to devise a form of executive supervision and to bring the dissociated branches of public service into harmony.

The difficulty centers in the weak position of the American state governor. The first American state constitutions were framed during the years of the Revolutionary War. Popular feeling was radical. It particularly distrusted the executive power. In nearly all the colonies there was a tradition of long and bitter conflict between the local legislatures and the colonial governors. Consequently in these state constitutions the governor was given as little power as possible. In most of the constitutions he possessed neither the power of veto nor the pardoning power. Appointments were ordinarily not entrusted to him but were made by the legislature, or, in the case of New York State, by a "Council of Appointment". Wherever the power to appoint was conferred, it was not accompanied by the power of removal.

As the progress of democratic belief led to constitutional changes there arose the system of direct election of important state officials and as new administrative needs arose these duties were confided to "boards" or "commissions", beyond gubernatorial control.

Recent years, however, have seen an astonishing rise in the position of State Governor. Politically the office has become next

Digitized by Google

in importance to that of President. In the control of party action and policies it has captured the influence represented not many years ago by the American Senate. Directly elected by the people, necessarily representative of the prevailing will of the commonwealth, in close touch with public opinion, the state governor is today an impressive political figure. Administratively, however, he continues to be weak. Charged with the duties of seeing that the laws are executed, he ordinarily has no control over the officers who must carry out this execution. The heads of state administration have the same tenure as himself, and may belong to an opposing party or represent policies to which he himself is opposed. The absence of the removal power makes it impossible for him to direct the action of the numerous offices and boards to which state administration is entrusted, and most state business continues to be confided to obscure individuals or bodies equally removed from the influence of public opinion and of superior executive supervision. It is this situation that makes it difficult or impossible for the American state to have an administrative policy, to enforce an economical use of state funds, to suppress or withhold unnecessary expenditures and to attain a uniform grade of effectiveness and responsibility in state business.

It is the more remarkable that the American people should tolerate an unsatisfactory and illogical type of government when they have constantly before them the model of federal administration. The temper of the convention that framed the federal constitution was strikingly different from that which devised the early state constitutions. It was practical rather than theoretical. It had profited by the experience of the confederation and its inefficient committee system of diffused responsibility. It felt the need of concentrating authority in the chief executive of the nation, and it created the powerful office of President. Departments and bureaus, as these have been successively authorized by Congress, have been made wholly subordinate to the President. Popular dissatisfaction with the work of any of them falls at once upon the chief executive, who has the remedy in his own hands. The result is that the American people in their federal administration have a system of national government as efficient, as responsive to public opinion, and probably as economical, as exists on a large scale anywhere. The acts and decisions of a subordinate branch of the national administration are usually accepted with complete confidence, and the variety of business entrusted

Digitized by Google

to the federal government annually increases. On the other hand, it is only a governor of unusual robustness of character with the advantage of repeated terms of office who is able to impress his policy generally upon the state administration.

Very gradually the American public is coming to recognize that in government there is a sharp distinction between "politics" and "administration". There are certain questions of government which are political and which in a democracy can only be rightly decided by the people themselves or by their directly elected representatives. They embrace all questions of general policy, of expenditure, of the regulation of conduct, and of pains and penalties. On the other hand, a large field of government is administration. It is concerned simply with carrying the popular determination into effect. It should be done without reference to party or political consequences. The state is interested only in having it done competently, economically, and with consideration for the public. Such work to be done well must have unity, a common standard, and continuity. All practical experience, as well as all sound theory, shows that these ends can be accomplished only by keeping administration distinct from politics, by giving it an appointive tenure, and by subjecting it to superior executive supervision. This last point, which is very important, is frequently overlooked by the American people. In much recently devised administration, and particularly in that of a "reform" character, the effect has been to create complete independence of supervision. The typical form is a "commission" appointed with a long tenure of office which cannot be interrupted, and endowed with powers over which there is no administrative review. In some cases continuing appropriations, adopted by constitutional amendment, have put administrative bodies beyond legislative as well as executive control. Such organization rests upon a complete misunderstanding of sound administrative principles. The political field and the administrative field must be sharply distinguished, but in popular government administration must always depend upon and be subordinate to politics. The creation of irresponsible commissions is simply oligarchical government. Exceptions may perhaps be made as to an independence of tenure in the case of judicial or quasi judicial bodies, like the United States Commerce Commission, the Federal Reserve Board, or a state public utilities commission, or, in the case of bodies created for the administration of a trust, like the regents of state uni-

Digitized by Google

versities, but these exceptions scarcely weaken the force of the principle, that if the state administration is to be continuously well done and done in accordance with a policy which the people of the state have endorsed and approved, it must be subject to the administrative control of the government which the people have chosen.

An American state governor, desirous of putting the public business of his commonwealth upon an economic and effective footing, finds his efforts limited not only by this deep seated distrust of administrative power and insistence upon confiding executive discretion to a great number of dissociated, independent and irresponsible offices, but also by the further American prejudice of undue local autonomy, extending not merely to the legitimate principle of a home rule in home affairs, but to independence and irresponsibility in the discharge by local officials, not of local affairs but of state business, including such fundamental matters as public peace and health. For the past thirty years there has been observable in this country a growing disposition to centralize state administration, or at least to create some sort of state control over state business locally conducted; but instead of employing the direct and simple device of giving the governor authority to suspend or remove a sheriff or a district attorney who fails or refuses to preserve the peace of the state or to enforce its laws, or to replace an incompetent health official in the moment of epidemic, imperfect and cumbersome forms of control have been sought; and frequently in place of the simple and effective principle of administrative supervision, resort must be had for the enforcement of a disregarded law to the dilatory and expensive remedy of the courts.

The State of California may be taken as a good example of an American commonwealth alive to the fact that an increasing range of public interests must be entrusted to the state government, extremely busy with legislation creating new kinds and forms of public business, but embarrassed in the organization of its service by a traditional administration that is still largely un-unified, inharmonious, and irresponsible.

An analysis of the present state administration discloses a number of distinct forms. In the early history of the state all important offices were elective, and elective offices still include, beside the Governor and the Lieutenant Governor, the Secretary of State, the Attorney General, the Controller, the Treasurer, the

Digitized by Google

Surveyor General, and the State Superintendent of Public Instruction. As pointed out above, these officials do not, like the President's Cabinet, form a harmonious staff, but each is quite separate from the others and from the Governor, and free to pursue a policy unrelated to the interest of other branches and dictated by considerations personal to the official. As to the manner in which these elected officials perform their duties the public gains at best an imperfect impression and usually can form no judgment at all.

Early in the history of the state it became customary, as new administrative agencies were required, to create "ex-officio boards", made up wholly or in part of elective officials. There are seemingly two different ideas behind these ex-officio boards. First, that they are economical, that public officials have less business than they can properly discharge, and may profitably be employed in giving their time to added duties. Second, that by placing the governor upon some of these boards a certain command is accorded him over the administration. The attorney general and the secretary of state, next to the governor, are officials most usually found upon ex-officio boards. In spite of a one time prejudice in their favor, this type of administration has not in general proved fortunate. It is not usually true, or should not be, that an official has time for service upon boards unrelated to his main interests and duty. It is notorious that of boards made up partly of ex-officio and partly of lay members, the ex-officio members are seldom present. So far as the governor is concerned, while his presence on a board may sometimes give him an influence which he would not otherwise have, it none the less places him in a false position. The governor, from the administrative point of view, is not "one among equals". He is or should be always a superior executive authority. To frequently override his view and his vote on an administrative board, is to impair his legitimate position. On the other hand a strong and influential governor, when he attends a board of which he is a member, is known to generally have everything his own way. The disposition is clearly to give up the ex-officio board form. The number of offices constituted in this manner is declining. Among boards of which the governor was a member there have been recently suppressed or reorganized the Board of Education, the Board of Examiners and the Capitol Commission.

The most economical, and on the whole the most efficient form for a public office, is the "bureau". The bureau implies a single

Digitized by Google

appointive head, who has complete administrative supervision over the personnel and activities of the bureau. The associates of the chief of the bureau are his adjutants and subordinates. While he may rely in a great degree upon their advice and initiative, he is alone responsible for the conduct of the office. The bureau as a modern form of administration appears to have arisen in France along with the other great administrative achievements of the Grand Monarchy. From France it has been generalized all over the world. It is almost uniformly employed by the federal government of the United States and by the government of the Philippine Islands, but owing to causes which have already been described, primarily the distrust of one-man authority, it has very little place in American state and local governments. Its strong points are its economy, the definite fixing of responsibility, the power of swift action, and in case good ability is secured in the directive head, the full command of this ability by the state. Its weak points are a disposition to routine, to the establishment of unduly rigid methods, and the development of over-conservative ideas, or what is commonly called bureaucratic red tape. Two conditions are requisite for the successful conduct of bureau administration; these are: (1) a superior administrative control and (2) the application of the "merit principle" to the subordinate personnel of the bureau, providing an examination basis for appointment and security of tenure. In this state a number of important offices are bureaus: the State Banking Department, the Building and Loan Commissioner, the Bureau of Labor Statistics, and the Printing Office since 1911, when the office of state printer was made appointive by the governor. Over the conduct of these bureaus the governor has immediate control through the power of removal from office. He does not have, however, what is essential to close supervision, a department secretary or staff colleague through whom oversight can be exercised. The development of a state civil service system should assure the conduct of these offices on a merit basis. Other offices of the state, with a single executive head like the Insurance Commissioner, Mineralogist, Horticulturist and Veterinarian are "irresponsible bureaus". The governor appoints the head for a fixed term without power of removal. His sole control is through his right of investigation. Normally a large portion of a governor's term expires before such positions are filled by officers of his own selection.

There are perhaps other reasons why the American people have

Digitized by Google

commonly preferred multiheaded authority, a group of officials coordinate in power, but certainly the compelling motive has been distrust—the notion that it is more difficult for three or five men to do wrong than for one. This typically Chinese conception, which determined the form of nearly every institution under the former Manchu regime, is likewise a fixed American prejudice. It has given us the "commission" form of administration.

By a commission is understood a collegiate executive, usually three to five persons, supposedly possessed of executive qualifications appropriate to their task, salaried, meeting daily or with great frequency and jointly administering the business entrusted to them. The doctrine of "separation of powers" eagerly appropriated by our forefathers from Montesquieu's *Esprit des Lois*, is, in the commission type of government, often wholly discarded. A commission frequently has, besides executive powers, a legislative or ordinance power and the functions of a court. Commissions have been frequently employed by the government of Great Britain, and some of the most famous bodies in English constitutional history were of this character, but it is interesting to observe that in England commissions in many instances have been abandoned, and while the pretense of a commission is preserved, executive authority has been fully conferred upon a single individual. The highest example of this in English government is perhaps the Treasury, which in earlier constitutional periods was actually discharged by the "Lords Commissioners for executing the Office of Lord High Treasurer". Legally, the financial affairs of the nation are still entrusted not only to the Chancellor of the Exchequer but to four other officials as well, the First Lord of the Treasury and the Junior Lords. Actually, however, only the first of these officials has anything to do with the administration of finance. The First Lord of the Treasury has come to be a position with practically no duties, and is ordinarily assumed by the Prime Minister, while the Junior Lords of the Treasury are the party whips in the House of Commons. The same is true of other British commissions, such as the Local Government Board, the Education Board, and the Board of Trade. In all of them, while the title is retained, the collegiate principle has been abandoned in favor of single or ministerial responsibility. But in American state and local governments commissions continue to occupy a very large field.

Except for administrative bodies that are judicial or quasi-

Digitized by Google

judicial in their functions, it is doubtful if the commission type of government realizes the expectations placed in it. In practice joint responsibility is seldom attained. Usually the policy of a commission is controlled by its chairman, or some other dominant personality in its membership. There is a disposition to occupy too much time in the discussion of minor details, and the effort at adjustment of view and accommodation of interest finally proves irksome. It frequently results in a commission that business is distributed among the different members, and then, almost invariably, that each member comes to look upon his particular assignment as his individual interest, to resent the intrusion of the views of others, and thereby destroy the principle upon which commission government rests.

A process of this kind took place in the work of what was undoubtedly the most important commission ever created under authority of the United States, namely the Philippine Commission, which governed the Philippine Islands from 1900 to 1907. During the early period of the work of this body, when its policy was dominated by Mr. Taft, all important matters were resolved by the commission as a whole, and authority and responsibility were truly collegiate, but eventually its character changed, members became heads of departments, each with preponderating interest in a special field, and in the end the body as an administrative agent lost most of its collegiate character. Something of the same history is exhibited in the commission government of cities at the present time.

Both popular discussion and legislative parlance frequently use the terms "commission" and "board" as synonymous. Administrative bodies are frequently termed "boards of commissioners", and a commission is often called a board, or a board a commission. For example, the California Industrial Accident Board is in reality a commission, while the Fish and Game Commission is really a board. The board type of administration as distinguished from the commission, reposes the administrative authority and responsibility not in a college of paid expert officials who directly execute the administrative task, but in a group of laymen, presumably representative citizens who are willing to assume the supervision and responsibility over a public task or a state institution, without salary but for the gratification of their own public spirit, or for the distinction and influence which public office bestows. Such a board, when acting according to the best principles of procedure,

Digitized by Google

does not itself actively administer affairs either as a board or through committees, but chooses an executive officer who is presumably an expert, who is salaried, and who gives his entire time to the institution under the board's jurisdiction. Good policy recommends that all administrative details, the nomination of subordinate employees and the formulation of policy, be entrusted to this executive, subject to the review and approval of the board. The board is in fact a lay jury sitting in judgment upon the plans and conduct of the expert in office. It almost invariably has the right to remove the official without statement of definite reasons. The executive official must therefore at all times possess the confidence of the board, and having this he is usually given very large discretion. In such cases it is a common remark that the superintendent, or whatever he may be called, "runs the board". This reflection, however, is in reality no disparagement of either the board or of the system. Any abuse of authority, any public scandal, any demonstrated incapacity, sees the assumption by the board of the full measure of its responsibility, and the necessary corrective action is taken.

The board is an exceedingly common type of administration in the United States, and on the whole it has worked tolerably well. It has certain elements of strength. At its best it secures for the state, without compensation, business experience and frequently legal capacity of a high order. There is no more encouraging phenomenon in American public life than the readiness with which men of large reputation and responsibilities will give generously and disinterestedly of their time and strength in service upon public boards. It has the advantage of associating in government the layman and the permanent official, and is the peculiarly American device for accomplishing this valuable end. The French system appears to prefer to associate with the executive official a lay council of purely advisory functions. The English system is the committee, on which laymen and official experts serve together. The German plan is the somewhat complicated but impressive association of the paid official and the experienced citizen in a relationship in which official authority decidedly predominates. But in the United States, cooperation in public business between men within and outside of official life is secured by the board and it is improbable that citizens of distinction and ability could be induced to serve either in an advisory capacity, as in France, or in a subordinate capacity as in Germany. In

Digitized by Google

America it is quite obviously the sense and pleasure of authority which compensates a man in whom the administrative instinct is strong for the sacrifice of his time and efforts in serving on a state board.

That there are corresponding disadvantages in the American board plan no one can deny. There is a strong disposition for members to "do politics", or to take administrative tasks out of the keeping of the executive of the board and entrust them to individual members or to committees. There is perhaps at all times too little intimate acquaintance of board members with the institution whose affairs they are responsible for. They may know its formal business but not its actual life. Knowledge of its deficiencies reaches them from outside complaints, not as a result of their personal knowledge and investigation. Furthermore, responsibility is diffused among a number of individuals who can usually find arguments for escaping the consequences of errors.

One serious difficulty of the board plan remains; it dissevers state administration into an indefinite number of uncorrelated independent units. It defeats unity in state administration. And inasmuch as appointments to membership on boards are almost invariably for fixed terms, it becomes impossible to hold the chief executive of the state responsible for the economy, honesty or effectiveness of the conduct of the institution's affairs. The State of California has seven state normal schools for training teachers. Each one is governed by an independent board which has practically no contact with the others, but determines its own policies and seeks its own individual legislative support. There are seven state hospitals for the insane similarly governed.

It must be apparent to anyone who studies carefully the work of the numerous commissions, boards, bureaus and elective offices of the state that the public service could be greatly improved, a large saving effected and a much greater responsibility to public opinion realized, if authority was centralized and unified—if, in other words, the administrative powers of the state governor were made commensurate to his political importance, his public position and his responsibility to popular will. It must also be apparent that our affairs are progressing toward this end. The Legislature of 1911 made the position of State Printer appointive, and increased to fourteen the number of positions where the occupant of the office holds his position during the pleasure of the governor.

Digitized by Google

A recent constitutional amendment has made the State Railway Commission an appointive body, where it was before popularly chosen. The Board of Control created in 1911 is another device for extending the governor's authority. The members of this "board", which according to our definition is a "commission" are appointed by the governor and hold office at his pleasure, and necessarily execute his policy in their control of the finances of state institutions.

In his message at the opening of the Legislature in 1913 the governor of this state expressed his need for another "arm" as he called it, an administrative board which should have a control over the administrative policy of state institutions commensurate with the financial jurisdiction of the Board of Control. This need was not met by the Legislature, and still remains unsatisfied. It would probably, however, be a more simple and much more workable plan not to create another and different board, but to increase the membership of the present Board of Control, enlarge its functions and alter its character. "Financial" and "administrative" supervision are too much one and the same thing to be successfully dissociated and entrusted to different bodies. What the governor really needs is an administrative council of at least six members appointed by him from men who possess his confidence, who will serve both as the directing heads of so many departments of state government, and as an advisory council for the consideration of the numerous political and administrative cares which constantly arise.

This second function is hardly less important than the first. No great executive office can be ably filled in default of wise and responsible counsel. A large measure of the success of the office of President of the United States attaches to the cabinet. It is essential that the closest advisors of a chief executive should be not merely men who are loyal adherents of his party and policies, but, like the chief executive himself, vested with the moderating responsibilities of public office, who are known to the public as those particularly charged with the state's affairs, and who, both by the governor and by the people, can be held to account for their success or mismanagement. The absence of such official advisors in American state government has had the unwholesome effect of causing the governor to lean upon unofficial advice, and at times to accept not merely the counsel but the dictation of men

Digitized by Google

not known to the public or enjoying public repute. The "state boss" is the legitimate result of a weakly constituted executive.

To properly reorganize the administration of the State of California would require a variety of actions, several of the nature of constitutional amendment. It would be necessary to classify and arrange in suitable groups or departments the different public offices. The number of such departments would differ under different plans, but taking into consideration the volume of the state's business it would doubtless require at least six, for instance: Public Safety and Welfare; Justice; Finance and Corporations; Education and Professions; Charities and Corrections; Public Works and Agriculture. The first four departments would be combined with the present offices of Secretary of State, Attorney General, Treasurer and Superintendent of Public Instruction. This would require constitutional amendments making these offices appointive and enlarging their duties. Another amendment would be necessary, empowering the Legislature to deal with the Board of Prison Directors, at present a constitutional body, in order to constitute the fifth department. With a few exceptions the rest could be done by statute. The Railroad Commission and the Board of Regents of the State University, for considerations expressed at the beginning of this discussion, would remain constitutional bodies. The State Controller should be vested with ample powers of audit and investigation and should remain a constitutional officer elected by the people at the same time as the governor.

David P. Barrows.

Berkeley, California.

Digitized by Google

Anomalous Growth of the Common Law—the Anglo-American Quest for Justice.

Law is the sense of justice taking form in peoples and races.
—Sir Frederick Pollock.

AS SOON as social relations begin, there arises the question of what right each member of society has in the conduct of the other members. Because of such relations each member must yield or forego some of the things which otherwise he might like to do and could do. If the sense of social justice, or righteousness, were at this time developed all men would thus forego without outside influence. But, since this has never been true anywhere as yet, it has been necessary universally to have "law". The purpose of law has been to recognize some of the things which men must give up to their fellow-men—things which from the standpoint of one are called legal rights and from the standpoint of the other are called legal duties and legal obligations—and to compel the men under duty and obligation either not wrongfully to violate such rights, or if they wrongfully do violate them to restore or redress the same. This is true of all systems of law—Babylonian, Egyptian, Hebrew, Roman and English.

An ideal system of law would recognize only such rights as ought to be recognized, and such wrongs as should be regarded as wrongful violations thereof, and would provide as adequate remedies as possible for protecting those rights either before or after violation, and as simple means as possible for enforcing the same. So long as any one of these ends is lacking, justice has not been found and people will continue on their quest. Even if one age should realize an ideal system of law for itself, such system might not be an ideal one for a succeeding more civilized age, and thus again the quest for justice would have to go on.

The history of the American and English people, from the time of William the Conqueror, 1066 to date, affords no more fascinating topic than the quest of these people for justice. The quest has

Digitized by Google

often been hap-hazard. It has almost always been unconscious. Yet through the ages an increasing juristic purpose has run. Men of this age and of that have hunted for justice as other men have hunted for the elixir of life or the phantom Eldorado. The goal of justice has not as yet been reached, but the history of the quest for it is not a history of failure but a history of progress.

CONTRACTS

Our law of contracts has passed through remarkable changes since the time of William the Conqueror, and I think it will be admitted that the general tendency of all the changes has been toward the goal of justice, though the causes which have produced the changes often had no such ultimate goal in view.

The most important topics in contracts are agreement, consideration, conditions, assignment, legality and discharge.

The modern consensual contract dates from the sixteenth century. Prior to the sixteenth century contract law did not rest upon consent. No action for breach of promise, though given for consideration, would lie prior to Henry VII. Whatever contract law then existed rested upon the foundation of the actions of debt and covenant. These actions came into use in the twelfth century. In debt a promise was not enforced, but proprietary rights were re-adjusted. In covenant a promise was enforced, but because of formality not because of agreement. There was no obligation in the absence of the formal word, however repugnant to justice the result might be. If the formal word was given, the giver was bound, however unrighteous it might be to enforce the promise. In the sixteenth century the action of assumpsit made its appearance. This was an action on the case in the nature of deceit. It was at first a tort action, but became a contract action as the remedy was gradually extended to cases of non-feasance. Yet as late as 1606[1] a goldsmith who sold a stone affirming it to be a bezoar stone escaped liability though it was not such stone, because he had not used the magic words "I warrant" or "I undertake". And as late as the reign of Elizabeth the court held that an innkeeper could obtain no relief at law from a gentleman of quality, who put up at his inn with his servants and horses because no price was agreed upon.[2] Even today in the cases of conveyances

[1] Chandelor v. Lopus (1603), Dyer 75a, n., 73 Eng. Repr. 160, Cro. Jac. 4, 79 Eng. Repr. 3.

[2] Young v. Ashburnsham (1587), 3 Leon. 161, 74 Eng. Repr. 606.

Digitized by Google

of land the grantee must have his covenant in the deed if he would be protected, although in the sale of chattels implied warranties arise without the use of magic words. The bilateral contract made its emergence in the seventeenth century, though it was not so named until Judge Dillon and Dean Langdell christened it. As a result of this development contract law today rests upon the foundation of agreement. One man is under obligation to another because he has promised. Modern contract law bears little resemblance to ancient, but there can be no doubt that because of the growth of the law of agreement, contract law is on a higher plane today than ever before.

Not every promise is yet legally enforcible. The common law still requires more than a mere promise to give or to do something. Of these requirements consideration is the most important. In the old action of debt the consideration required was benefit to the promisor (*quid pro quo*), if we may call this consideration. In covenant there was no consideration required, except as a result of the development of assumpsit. In assumpsit the consideration was detriment to the promisee (or the promise thereof). Debt and covenant have become almost obsolete as a result of the development of assumpsit. There are many circumstances under which a person ought to pay for a benefit conferred, as under the old action of debt, and if these obligations had gone with debt, the law might not have progressed; but the old obligations have been preserved in the modern law of quasi contracts, which grew out of equitable constructive trusts by the extension of the action of general assumpsit. The reason why debt had to go was not because it enforced unjust claims, but because of the mode of proof (wager of law) connected with it. The true principles of consideration and quasi contracts were unearthed by Langdell, Ames and Keener when they made their historical survey of the common law. It may be wondered whether or no the common law has made progress in its almost inexplicable changes in the matter of consideration, but I think the importance of liability where a promise has been given in exchange for some legal detriment alone will convince anyone that such is the case. The time may come when other promises should be enforced, but no fewer promises should be enforced than are now enforced by the common law. The study of the historical development of consideration shows progress in the quest for justice.

In the early common law there were no conditions except

Digitized by Google

express conditions, but the courts began to scrutinize covenants for conditions. After the simple bilateral contract came into existence the old analogies at first prevailed, and only express conditions were recognized. Lord Holt came close to the implication of conditions in 1701,[3] but the honor remained for the great Lord Mansfield, who, in 1773, clearly established the doctrine of implied dependency as to conditions precedent.[4] In 1792 it was held that concurrent as well as precedent conditions would be implied.[5] Mansfield developed implied conditions by the road of the construction of the intention of the parties. In modern law conditions are implied from the idea of the court as to what is just, because it assumes that performance is presumed to be given for performance. Today there are many contrary holdings and perhaps undue technicality in regard to the performance of express conditions, installment contracts and breach of conditions; but no one will dispute that the law of conditions as a whole is in the line of progress, and that the modern theory of implied conditions is close to the goal of justice.

The common law allowed no assignment of the rights of contract. Equity permitted the assignee to sue wherever specific performance would lie. Then the common law permitted the assignee to sue in the name of the assignor. Later the codes authorized the assignee to sue in his own name, adopting the principle of equity. Each one of these changes marks a step in advance.

As to what will amount to illegality, the decisions of the courts also show a growing moral sense. Wagers, which were first held illegal in England, and then legal if not against public policy, have in the United States been held illegal because against public policy. In some matters, such as champerty and maintenance, the decisions of the courts are not so rigid now as they formerly were, and some think that thereby the courts have taken steps backward, but not many instances of this sort are named.

At one time an accord and satisfaction, but not an accord alone, would discharge a contract, because the doctrine arose before the modern consensual contract, and the rule persisted after the reason for it disappeared; but an accord was allowed to

---

[3] Thorp v. Thorp (1701), 12 Mod. 455, 88 Eng. Repr. 1448.
[4] Kingston v. Preston (1773), cited in Jones v. Barkley, 2 Douglas 689, 99 Eng. Repr. 437.
[5] Goodisson v. Nunn (1792), 4 T. R. 761, 100 Eng. Repr. 1288.

Digitized by Google

discharge a contract in case of a composition in 1831,[6] and today an accord generally is enough if it is the intention of the parties to take the accord in satisfaction. There may be a question whether the law of discharge is not still overburdened by technicalities, as for example in the requirement of a consideration and the refusal by the United States courts to allow the rescission, by an oral bilateral, of a unilateral contract before breach. There can be no question but that the law has been in a constant state of improvement.

Thus it clearly appears that the Anglo-American law of contracts has been, not only constantly changing—instead of remaining fixed, as some maintain is the characteristic of the common law of the past, and should be the characteristic of the common law of the present—but it has been constantly approaching more nearly to the ideal of justice.

Agency

When our substantive law shall have reached perfection, how far will the legal consequences of one person's acts be visited on another? Apparently our common law has not been able as yet to answer this question. The common law of agency began with the vicarious responsibility of a man for the acts of the members of his own household. Civilization could not long tolerate such a rule. Consequently we find that criminal responsibility passed away by 1200 and civil responsibility by 1300. From 1300 to 1689 one person was responsible for the acts of another only in cases of command.[7] One who had suffered from the unauthorized misconduct of a servant, acting within the scope of his employment, could obtain no compensation. As a result largely of the revolution of 1688 the English courts held that there was a presumption that all acts done in furtherance of the master's affairs were done by his authority.[8] This was in the time of Blackstone and Lord Holt. In the nineteenth century this presumption ripened into a positive rule. In torts a master is liable now for any act of his servant in the course of his employment and in furtherance of it. In contracts a principal is bound by any contract which the agent makes while acting within the scope of his actual or apparent authority. To these rules the fellow servant doctrine is the great exception. Here the common law apparently

[6] Good v. Cheesman (1831), 2 Barn. & Ad. 328, 109 Eng. Repr. 1165.
[7] 7 Harv. Law Rev. 330, 332, 335, 384.
[8] Tuberville v Stampe (1698), Comb. 459, 90 Eng. Repr. 590.

Digitized by Google

has lagged behind the times, for the modern legislatures are passing workmen's compensation acts for the ostensible purpose of relieving the workmen from an unjust rule. An undisclosed principal was allowed to sue in 1712 and to be sued in 1812.[9] Justice probably always will demand some measure of liability by a master and principal for the acts of servants and agents, yet it would seem that progress would come by reducing this liability to the minimum and by holding all men liable only for their own wrong doing. It is unjust to hold a master liable for damage done by his servants when acting within the course of their employment although they carelessly or even wilfully disregard his instructions, and although he has used all possible care in their selection; yet expediency will require this rule for some time to come. However, it would seem that, as to their rights, servants should be put upon the same footing as strangers, whatever rule is adopted as righteous and just.

Enough has been said to show that, though there may be difficulty in deciding how much progress there has been made in the development of the substantive law of agency, there have been as great changes here as in the law of contracts.

Bailments, Carriers and Public Callings

The early law of bailments, carriers and public callings cannot be understood apart from the action of detinue, which was the one action (aside from account) available to bailors and which gave character to the substantive law of bailments and public callings. Bailees were regarded as owing to the bailors the chattels placed in the formers' possession. Bailees in public calling were liable for particular losses as insurers. In 1703 Lord Holt,[10] borrowing doctrines largely from the Roman law, decreased the liability of all bailees except common carriers, though he did not put the liability of mandataries and ordinary hiring bailees as low as it would be placed today. In 1785[11] common carriers became absolute insurers except for the act of God and the act of the public enemy. Today, in bailments for the sole benefit of the bailor the bailees are bound to exercise only slight diligence; in bailments for the sole benefit of the bailee, the bailees are bound to exercise high diligence; in bailments for mutual benefit, the bailees are

[9] Paterson v. Gandasequi (1812), 15 East 62, 104 Eng. Repr. 768.
[10] Coggs v. Bernard (1704), 2 Ld. Raymond 909, 92 Eng. Repr. 107.
[11] Forward v. Pittard (1785). 1 T. R. 27, 99 Eng. Repr. 953.

Digitized by Google

bound to exercise ordinary diligence; though it seems permissible to vary these obligations to some extent by special contract.

Public callings, once many, grew less with the theories of individualism and competition in vogue in Adam Smith's time; but more recently have been growing again in numbers, until now in the United States they include public warehousemen, innkeepers, all common carriers of goods and of passengers, public utilities, and possibly insurance companies, the associated press and even the so-called trusts. At first to be an innkeeper one had to furnish food, lodging and stabling, but the law has undergone change gradually until today lodging (for transients) alone may be enough.[12] All public callings always have been required by the common law to serve with adequate facilities, for reasonable compensation and (more recently) without discrimination. In respect to the above obligations the law has undergone little change, either because true and universal principles were discovered early, or because courts and law makers have been too busy applying the obligations to change them. Methods of regulation of public callings have had remarkable growth. As to diligence and liability for loss the law has not been so stationary. Innkeepers at first were not liable for injury to guests[13] but were liable almost as insurers for their goods, while today they are liable to the guests for negligence and are under only a prima facie liability for their goods, which last liability may be escaped by showing absence of negligence.[14] The common carrier's early common law liability has been modified in modern times by adding to the exceptions to his absolute liability. Now the common carrier is excused from liability, not only when the loss is due to act of God or act of public enemy, but also, to inherent nature of goods, act of the shipper and act of public authority. Common carriers of passengers remain bound, in absence of special contract, to exercise the highest diligence.

The courts have permitted all persons engaged in public callings to narrow their common law liability for loss of goods so long as they do not exempt themselves from liability for negligence,[15] and the majority of the courts now allow common carriers

---

[12] Nelson v. Johnson (1908), 104 Minn. 440, 116 N. W. 828.
[13] Cayle's Case (1584), 8 Co. 32 a.
[14] Johnson v. Chadbourn Finance Co. (1903), 89 Minn. 310, 94 N. W. 874.
[15] Some courts, as for example the English and New York courts, have allowed even greater freedom of contract.

Digitized by Google

of passengers to exempt themselves from all liability, except for wanton acts, to persons riding on free passes.[16] As a consequence common carriers of goods have had two rates, one for shipment under contract liability and another for shipment under common law liability. How far the freedom of contract is going to be allowed to grow is problematical, but there are indications of governmental limitation on such growth and of a return to one liability, more liberal than the so-called modern common law and less liberal than the modern contract.

No more interesting example of the anomalous growth of the common law can be found than in the law of bailments, and public callings. Here we see how the over-exacting requirements of the early law have been modified, and how the law has changed from century to century to meet changing conditions. This branch of the law may not be perfect yet, but a historical review shows a constant approach to perfection. No one would care to go back to the law of the twelfth century. Why, on the one hand, should a system so progressive be criticised, or, on the other hand, should any objection be made to future changes in such a system?

Persons

The growth of the law of persons has been kaleidoscopic, but it must be admitted that most of the changes, which advancing civilization has demanded, have been accomplished by legislation rather than by the evolution of the common law through the instrumentality of the judges. Thus have come about the great reforms in the law of married women, infants, the insane and corporations. The common law is not to be commended for its position herein but rather is the subject of criticism, so that the opponents of change in the common law will find little comfort in the history of the law of persons. Today in spite of the great legislative reforms of the past, the law of persons still needs other minor reforms, and its growth should continue. The law as to the rights and obligations of married women needs important modifications in many jurisdictions. Has not the time come when the defense of infancy should to a large extent be abolished? Should not a lunatic be compelled to make reparation to one injured by his act—at least if the lunatic is rich and the injured person is poor?

---

[16] Northern Pac. Ry. Co. v. Adams (1904), 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408.

Digitized by Google

Property

The law of property affords a rich field to the student of the Anglo-American quest for justice.

In the development of the law of liens we see a rather strange instance of injustice, where apparently judges were trying hard to work out principles of justice. In the beginning, common law liens were given when there was no promise, and therefore the party would have been remediless had not a lien been given him. The next step in the development was where the lien was given also when there was an inferred promise, but the lien was not given in such case to the agister because it had been decided in the first stage of development of the law of liens that an agister, who in that case happened to have an express promise, had no lien. Finally the lien was given also when there was an express promise. Of course now there was not the shadow of an excuse for not giving the lien to the agister, but the mistake continued, so that it had to be corrected by statute. Most states have now made this correction.[17]

In perhaps no branch of the law do we find more changes than in that of real property, and in perhaps none is it more difficult to decide whether or not the changes have been toward the goal of justice. Many changes have been brought about by such outside influences as legislatures and chancery. Yet the common law courts are not without some credit in the matter. One of the most unfortunate results of this sort of development is the great amount of legal debris that still clutters up the territory of the modern rules, which have finally been evolved.

The incubus of the feudal system with its estates and tenures has been gotten out of the way, but what a trail it has left upon of the law of real property! Military, socage, frankalmoign and villenage tenures, because of legislative reforms, no longer exist, but their mark can still be seen. The Statute of Quia Emptores (1290) hit the first blow at the system by abolishing subinfeudations, and the Statute of Charles II (1660) abolished all tenures except common socage (Grand Serjeanty, etc.) But today land is still held of the state as is shown by the doctrines of escheat, taxation and eminent domain.

What a history the fee tail has had! It was a fee conditional before 1285. It was a fee tail between 1285 and 1473. Beginning

---

[17] See Ames in 2 Harv. Law Rev. 61, 62.

Digitized by Google

with 1473 it was defeated and made a fee by the devices of common recoveries and fines, and in 1579 the rule announced in Shelley's Case completed the work of destruction so far as the courts could destroy it. In 1833 the power of alienation was granted in England, and in the United States the fee tail has been abolished generally by statute.

The common law judges refused to enforce a use or trust, and refused to allow gaps or laps in estates. Equity (1422) began to enforce uses out of analogy to the enforcement of devises.[18] In 1536 the Statute of Uses was enacted in the interest of the land owners for the purpose of destroying uses, but by a strange legal chance had the opposite effect. However, the Statute of Uses was not broad enough to include all uses, and equity continued its jurisdiction in the case of a use on a use, active trusts, use grounded on an estate less than freehold, estates tail and copyholds. As a further result of its work in this connection equity, overriding gaps and laps, gave us the new estates of resulting, springing and shifting uses, and the new conveyances of bargain and sale and covenant to stand seised.

Before 1278 guardians in chivalry, and tenants by curtesy and dower alone were liable for waste. All of these were liable for voluntary waste, but probably none of them for permissive waste. After 1278 tenants for life and for years, by virtue of the Statute of Gloucester, and tenants at will, by virtue of judicial construction, have been liable for voluntary waste in both England and the United States until today, for permissive waste in England until 1899[19] and in the United States still, and for ameliorating waste in England (though not in the United States) until 1891.[20] These slow but desirable changes have corrected most of the defects of the law of waste. But one further defect had to be corrected by equity. This was the liability of tenants for life without impeachment for waste, tenants in tail after possibility and owners in fee upon limitations, for using the property otherwise than a prudent man would. Equity held all of these parties liable (1599) and the name of equitable waste has accordingly been given to the conduct.

The test of a fixture was at first physical annexation, but this test has gradually become less important, except in machinery cases, until today in the United States the test is intention, either

---

[18] 2 Select Anglo-American Essays 715.
[19] In re Cartwright (1889), L. R., 41 Ch. Div. 532.
[20] Meux v. Cobley, [1892] 2 Ch. Div. 253.

Digitized by Google

expressed, or if not expressed, as inferred from (a) the relation to the freehold of the annexer, (b) the mode and degree of annexation, and (c) adaptability to the use of the freehold.[21] The result is that a great and just distinction is made between annexation by the owner or one standing in an analogous position, and annexation by a tenant.

The early common law as to waters has been modified so as to bring it into harmony with modern conditions. Riparian ownership of watercourses, surface and subterranean, has been modified in the western United States by the doctrine of appropriation—absolute and modified. The common law doctrine that surface waters were a common enemy has been modified in some jurisdictions by the principle *sic utere tuo ut alienum non laedas*. The common law doctrine which permitted the drainage away of percolating waters, while at the same time giving absolute ownership, has been modified so as not to permit the taking away of water from another's land by means of pumps, etc.

Bills and Notes

Bills (or letters) of exchange were legally recognized in the beginning of the fifteenth century, and the evolution of five centuries has produced but slight changes in the most marked features of the early law. One great change which has made headway, in spite of the formal character of bills and notes, is that of alienability by indorsement, through the growth of the law of representation and the improvement of title by transfer. But in the main they were formal contracts, remain formal contracts and ought to remain such, because of the exigencies of the business world. The Uniform Negotiable Instruments Act is an effort to so fix the law.[22]

Insurance

The law of insurance is another part of the common law whose roots run back into the law merchant. The law merchant was introduced into London by the Italian merchants on Lombard Street, and was at first enforced by merchants' courts. The history of the law of insurance is largely a history of how the common law got jurisdiction away from the merchants' courts. In 1570 the Privy Council appointed arbitrators, but this scheme failed. The admiralty courts were not satisfactory. The Court of Insurance

---

[21] Teaff v. Hewitt (1853), 1 Oh. St. 511.
[22] 3 Select Anglo-American Essays 51.

Digitized by Google

Commissioners created by act of Parliament (1601) was unsuccessful and died. The regular common law courts were at first unfit (1588), but Lord Mansfield (1756-1788) accomplished what others had failed to accomplish. By summoning juries of merchants to establish the customs, usages and maritime laws of the continent he succeeded in giving the King's Bench jurisdiction over insurance cases. Insurable interest was required by statute in 1746. The concealment doctrine arose in 1743.[23] The warranty doctrine arose in 1691.[24] The technicalities of the law merchant features of insurance law are in modern times becoming of less and less importance owing to the adoption of standard policies. The future of insurance law seems destined to be involved in the increasing power of the state over the conduct of the business. This may take either the direction of state insurance, as in the state of Wisconsin, or, more probably, the direction of state control, on the theory that insurance companies are public callings, as in the states of Iowa[25] and Kansas. The law of public callings would seem to afford a complete solution to any problems of injustice that remain in connection with the law of insurance.

Sales

In the law of sales we discover many problems which have long bothered the courts, while they have been on their quest for justice.

Should the ascertainment of price be a condition precedent to the passing of title? At first it was held in England that title could be transferred only by delivery or payment. Then the reciprocal grant doctrine was adopted, whereby it was held that title might pass without delivery and payment if credit was given. Finally the English courts held that title would pass according to the intention of the parties whether or not credit was given. Then arose the question: If something remains to be done to ascertain the price does that indicate an intention not to have title pass? This was at first answered in the affirmative as an absolute rule.[26] Later this was qualified by confining the rule to an unascertained price to be fixed by the seller.[27] The English Sale of Goods Act has so fixed the law. In the United States some courts follow

[23] Seaman v. Fonereau (1743), 2 Str. 1183, 93 Eng. Repr. 1115.
[24] Jeffry v. Legender (1692), 3 Lev. 320, 83 Eng. Repr. 710.
[25] Duffy v. Bankers etc. Assn. (Iowa, 1913), 139 N. W. 1087.
[26] Hanson v. Meyer (1805), 6 East 614, 102 Eng. Repr. 1425.
[27] Turley v. Bates (1863), 2 H. & C. 200.

Digitized by Google

Hanson v. Meyers, some Turley v. Bates, and a few have done away with the presumption of retention of property because something remains to be done to ascertain price.

Should the title pass at once in the sale of a specific quantity from a larger uniform mass? The English courts at first answered yes;[28] but this case was overruled by later cases, in spite of the fact that the same courts recognized tenancy in common in the case of confusion of goods. In the United States the prevailing doctrine has been that title will pass if the parties so intend.[29] At first it was doubted if the parties would be tenants in common, but now it is held that they are tenants in common with right of severance in the case of fungible goods.

Should title pass in a cash sale? The early law was that title would not pass. Payment or credit was required. In modern law there is a presumption that there is an absolute sale, but that the seller has a lien in lieu of title.

In the sale of goods having a so-called potential existence, should the title pass when the goods come into existence freed from any defects of title due to rights which have accrued since the time of the original bargain? An early English case,[30] decided after the doctrine was already two hundred years old, held that a seller might so transfer title. This, since, was limited to crops and the young of animals, and at last was abolished in England by the Sale of Goods Act. The doctrine has been narrowed in the United States, so as not to apply to crops to be grown beyond the next season. The American Sales Act follows the English in this respect. But it is held that, though the doctrine of potential existence is abolished and turned into a contract to sell, such contract to sell may have equitable effect in the nature of a lien upon the goods as acquired, except against bona fide third persons, where specific performance would lie, or a mortgage has been given and damages would not be an adequate remedy for a promise to give security.

Crimes and Torts

Prior to 1200 the law of torts and crimes was not separated, and the rule was to visit liability on the visible offending thing.[31]

All early English law was unmoral even after 1200, but this

---

[28] Whitehouse v. Frost (1810), 12 East 614, 104 Eng. Repr. 239.
[29] Kimberly v. Patchin (1859), 19 N. Y. 330.
[30] Grantham v. Hawley (1616), Hob. 132, 80 Eng. Repr. 281.
[31] Wigmore in 3 Select Anglo-American Essays 474.

Digitized by Google

was especially true of early criminal law. It was written in blood. It made no distinction between crimes and criminals. Though a party assailed had killed his assailant in self-defense, using no unnecessary force, such killing was not justifiable homicide. He had to go to prison, and trust to the king's mercy for pardon, and although he obtained his pardon he had to forfeit his goods for his crime. Yet our English ancestors desired justice, and when their moral sense rebelled against the unmoral character of their early law, changes in their criminal law began to appear. Criminal liability in case of killing in self-defense disappeared comparatively early. First, pardon became a matter of course, and then the jury was allowed to give a verdict of not guilty. Many other reforms in the substantive side of our criminal law have followed. But, when many of our states still have from a thousand to fifteen hundred acts catalogued as crimes and misdemeanors, it is at least an open question as to whether or no the work of reform is completed. Yet, astounding as is the fact of the number of things still made crimes or misdemeanors, it is also an open question as to whether or no we should not have more acts made crimes. Suppose a man, who accidentally shoots another by a glancing shot, should, after seeing his victim, go off and allow him to die. Ought this man to be held criminally liable or not? Again, ought not an innocent man to be compensated by the state for an unmerited punishment?

The early English tort law, after 1200, was characterized by the same absolute liability. A defendant sued in trespass for battery was liable, though he showed that he was acting in self-defense. He had committed the battery and must make reparation. But of course he had an independent action against the plaintiff. Early English tort law was also mostly confined to trespass. Prior to 1500 the common law gave no redress against the slanderer. For centuries no action was maintained for deceit in the sale of a chattel. An action for malicious prosecution—though a criminal prosecution instigated malevolently with knowledge of the plaintiff's innocence—would not lie until the middle of the seventeenth century.[82] No relief against the unauthorized printing by a stranger of an unpublished work of an author was given until the second quarter of the eighteenth century. The action of the husband for the alienation of the affections of his wife dates from

[82] Savile v. Roberts (1699), 1 Ld. Raymond 374, 91 Eng. Repr. 1147.

Digitized by Google

1745.[33] The tort of procuring breach of contract is still more recent.[34]

The unmoral character of early tort law had to give way as the English people continued on their quest for justice. However, the doctrine of civil liability for damage caused by a morally innocent actor was very persistent. Thus a sleep walker would be held liable for everything he broke in his sleep. But little by little there grew up the doctrine that an unintentional injury to another would not render the actor liable, and finally, in 1891, the court of Queen's Bench[35] held not liable a man who shot out the eye of another by a glancing shot fired at a pheasant. The late Dean Ames remarks: "The early law asked simply—'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in cases based on public policy, asks the further question—'Was the act blameworthy?' "

Yet, great as have been the changes in the law of torts, we cannot yet say that the transformations are complete. Should a lunatic be held liable for damage inflicted by him? Should one be required to keep at his peril fierce wild animals and domestic animals after knowledge that they are dangerous? Should a bank be liable on a bank note printed but never issued, if it is stolen? Should not a judge be held liable for slanderous words spoken on the bench? Should not one be liable for using without consent for advertising purposes another's likeness? Should not a man be liable in all jurisdictions for damage done by a spite fence? Should not a man be civilly liable when he sees another in great danger, as drowning, or on a railroad track, if he makes no effort to rescue?

Remedies

Aside from certain possessory actions, the only remedy which the ancient common law gave for civil wrongs was damages, and even that remedy in the beginning was not the developed remedy of today. The remedy of damages was available at common law only where common law actions were available. Until the sixteenth century none of the actions on the case—including trover, trespass on the case, case, special assumpsit and general assumpsit—were available, and trespass and account were not available until the thirteenth century. The various actions on the case were the crea-

[33] Winsmore v. Greenbank (1745), Willes, 577, 125 Eng. Repr. 1330.
[34] Lumley v. Gye (1853), 2 E. & B. 216, 118 Eng. Repr. 749.
[35] Stanley v. Powell, [1891] 1 Q. B. 86.

Digitized by Google

tions of the clerks in chancery acting under Statute of Parliament enacted in 1289. Upon the actions on the case is based our whole law of defamation, malicious prosecution, deceit, nuisance, negligence, express contracts, inferred contracts, and quasi contracts. Even our law of damages is of modern origin. There could be no law of damages so long as the jury—which came in with the action of trespass—exercised its early function of deciding facts as of its own knowledge, or even so long as the damages were "at large" as in torts generally. The growth of the law of damages has come through the courts obtaining control over the machinery of proof, making the verdict conform to a standard of damages derived from legal principles, and holding these legal principles binding upon itself.

But even our perfected modern remedy of damages would have been wholly inadequate for many injuries which were constantly being inflicted by men upon their fellowmen. The promise under seal was regarded at common law, not as evidence of the contract, but as the contract itself. Accordingly, if the promisee lost the instrument or if it was destroyed, he had no action, for a year book judge said, "if the specialty is lost the whole action is lost."[36] Ethically the promisee was still entitled to the amount named in the instrument as much as though it had not been lost or destroyed, but the early law was not concerned with ethics. Likewise an obligor who had formally executed an instrument, was helpless though it was obtained by fraud or was given for immoral purposes, or upon an assumption in the offer that was not true, or even if he had once already paid the same in full, if he had neglected to take a release or to secure the destruction of the instrument.[37] Often, injuries threatened were so serious that they ought to be prevented, or injuries committed were so irreparable that they ought to be specifically repaired; damages would be an inadequate remedy in either case. These defects in the common law remedies have been remedied by equity.

Equity has been the greatest single factor in the development of the English law. Its influence has not been confined to the law of remedies, in spite of the fact that it has given us some twenty-five equitable remedies. It has also contributed to the perfection of the common law, by supplying some omissions in procedure, and

---

[36] Y. B. 24 Edw. III, 24, pl. 1.
[37] 9 Harv. Law Rev. 52-54.

Digitized by Google

in the substantive law of antecedent legal rights, and it has also contributed much to all branches of law by giving them a more ethical aspect.

Equity acts *in personam* rather than *in rem* and it has therefore regarded the duty of the defendant more than the right of the plaintiff, and because of this emphasis has been more ethical than law. The injustice of allowing an obligor to profit at the expense of an obligee because of the mere loss of an obligation prevailed in chancery in the seventeenth century, and in the following century in the common law courts, where recovery was allowed on secondary evidence. Equity also gave relief to an obligor when it would be unconscionable to permit the obligee to enforce his obligation, by commanding him under pain of imprisonment to abstain from the exercise of his right. Now, by statute, defendants are allowed at common law to plead equitable defenses. Equity has granted specific performance of certain obligations (fifteenth century),[38] enjoined the performance of other acts (sixteenth century), granted rescission and cancellation of contracts for fraud, mistake and other inequitable conduct, restrained the enforcement of common law judgments obtained by fraud, compelled mortgagees to surrender mortgaged property, compelled the holders of penal bonds to surrender them up without exacting the penalty, and established constructive trusts—acting upon the highly moral principle that no one should, by the wrongful acquisition or retention of property, unjustly enrich himself at the expense of another.

Should a third person for whose sole benefit a contract is made be allowed to sue thereon? England permitted such suit in a case decided in 1677,[39] but repudiated this position in 1861.[40] In the United States, Massachusetts and New York do not allow such suits, except in insurance cases; but most of the other states do allow them, although the reasons therefor have not as yet been fully worked out. On strict common law principles (in assumpsit) perhaps the action ought not to lie. Early equity gave no such relief. Yet here is a case where some remedy is needed. Most courts have arisen to the situation and have invented a remedy in the nature of equitable relief. This is a good illustration of the latent power of

---

[38] Ames, Cases on Equity, 37.

[39] Dutton v. Poole (1677), 2 Lev. 210, 83 Eng. Repr. 523.

[40] Tweddle v. Atkinson (1861), 1 Best & S. 393, 121 Eng. Repr. 762.

Digitized by Google

the courts still to extend the law of remedies where justice requires it.[41]

Procedure

Nothing in connection with the Anglo-American system of law is more remarkable than the history of the law of procedure. Constant changes have been the order. The earliest forms of administering justice which existed in self-help gave way to the ordeal and wager of law peculiar to Anglo-Saxon procedure. The Anglo-Saxon ordeal and wager of law were in turn replaced by the Norman jury (and to some extent by the Norman wager of battle). The jury system itself underwent constant change. The jury little by little changed from witness-judges to judges of the facts, and less and less power in this last respect has been given them because of the growth of the law of damages. Attorneys took the place of champions, and an intellectual tournament thus was substituted for the old physical tournament. The technical rules of pleading, evidence and practice grew up. Common law procedure was under continual change. Equity procedure has modified common law procedure, and in turn has been modified by it. Legislation, as in the English Judiciary Act of 1873, the Field Code and the New York Code of Civil Procedure abolished the distinctions between the various forms of actions, simplified the rules of pleading to some extent by requiring the allegation of the facts, modified the rules of evidence slightly—as by allowing parties to civil actions to testify—and attempted to reform the rules of practice by requiring the determination of law suits upon their merits. In common law procedure justice was sacrificed on the altar of form. Technicality was more important than justice. The rules of procedure had to be obeyed, no matter whether legal wrongs were prevented or redressed. The means was allowed to become the end. Much was expected of the code reforms. More might have been acomplished thereby, had the attorneys of the day taken more kindly to them. As a matter of fact our code procedure is practically as bad as common law procedure ever was. A class of attorneys—shrewd, tricky and ingenious—has been developed. Delays, reversals, technicalities and expense are weapons in constant use. Administration of justice is a game

---

[41] Williston's Wald's Pollock on Contracts, 237-278; 3 Select Anglo-American Essays 339.

Digitized by Google

played by practitioners at the expense of their clients and society. Procedure has again become the end instead of the means.

What should be the future of our legal procedure? Shall we allow our procedure, our machinery for the administration of justice, to continue to be a game so expensive that only the rich can afford it? Or shall it become a system for the administration of justice on earth? The answer cannot be too emphatic, that procedure must soon retire to its proper place. If the legal profession does not take on itself the task of seeing that this is done, society will do it without the aid of the legal profession.

Progress in the past has been slow—too slow—but we have had progress; we are going to continue to have progress. Our laws will fit future generations no more than the laws of the eleventh and twelfth centuries fit us. We must press forward, not backward, and you and I and all others engaged in work in the legal field should help in the Quest for Justice.

Hugh Evander Willis.

Southwestern University,
Los Angeles, California.

Digitized by Google

The Sherman Act and the Harvester Case

WITH the enactment of the anti-trust program of the administration,[1] it is evident that this country has passed into a stage of regulation and control of large industrial corporations.[2] The new legislation is, however, avowedly designed, not to repeal, but to supplement the present statutes dealing with combinations.[3] For this reason the attention of those who desire to interpret and apply the corporation laws passed at the present session of Congress must first be directed to the scope of the Sherman Act as it is now construed by the courts.

At the present time, therefore, the treatment of the Sherman Act by the court in the case of United States v. International Harvester Company,[4] is of more than usual interest. This action was brought by the government to dissolve the International Harvester Company as an illegal combination in undue restraint of trade, and hence illegal under the Anti-Trust Act. It was held that the defendant company was such a combination in restraint of trade and it was ordered that the property of the company be divided among distinct independent corporations. The case was tried before Circuit Judges Sanborn, Hook and Smith. Judge Sanborn

---

[1] The administration trust legislation as finally passed consisted of "An Act to create a Federal Trade Commission" approved on September 26, 1914, and of "An Act to Supplement Existing Laws against Restraints and Monopolies, and for other Purposes" (The Clayton Act) approved on October 15, 1914.

[2] The Federal Trade Commission has power to compel corporations to file with the Commission annual or special reports in such form as may be prescribed by the Commission, (§ 6 (b) Fed. Trade Comm. Act). Power is also given to the Commission to suppress "unfair methods of competition . . . . if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." (§ 5 Fed. Trade Comm. Act.)

[3] See Report of Senate Committee on Judiciary reporting Clayton Bill as amended. Here it was said: "It is not proposed by the bill or amendments thereto to alter, amend or change in any respect the original Anti-Trust Act of July, 1890. The purpose is only to supplement that act and the other anti-trust acts referred to in section one of the bill."

[4] (August 12, 1914), 214 Fed. 987.

Digitized by Google

dissented from the main opinion, which was written by Judge Smith and concurred in by Judge Hook. The court was well acquainted with actions arising under the Sherman Act, since Judges Sanborn and Hook had sat in the cases of United States v. Union Pacific Railroad Company[5] and United States v. Standard Oil Company,[6] and the former concurred in the Northern Securities decision.[7]

The significance of the case lies in the fact that the Harvester Company was at once a large corporation and a corporation which dealt fairly with its business rivals. In its fair methods of competition, the Harvester Company differed from the Standard Oil Company, the Tobacco Company and the other large industrial companies theretofore held illegal under the Sherman Act. Organized in 1902, with a capitalization of $120,000,000, the result of a combination of five large companies, it produced eighty to eighty-five per cent of the binders, mowers, reapers and rakes sold in the United States. That the corporation did not use its natural power to oppress its competitors and create a monopoly is shown by the opinions rendered in the action.

The opinion of the court, rendered by Judge Smith, reads in part:

> "While the evidence shows some instances of attempted oppression of the American trade by the International and the America Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just."[8]

Judge Hook, writing a short concurring opinion, declares:

> "It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean, and fair."[9]

In his dissenting opinion, Judge Sanborn says:

> "The weight of the evidence of the officers and agents of their competitors, who came in large numbers to testify, and of all the witnesses upon the subject, is so overwhelming that

---

[5] (1911), 188 Fed. 102, on appeal (1912), 226 U. S. 61, 57 L. Ed. 97, 33 Sup. Ct. Rep. 1.

[6] (1909), 173 Fed. 177, on appeal (1911), 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502.

[7] U. S. v. Northern Securities Co. (1903), 120 Fed. 721, on appeal, Northern Securities Co. v. U. S. (1904), 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436.

[8] 214 Fed. 987, at p. 993.

[9] 214 Fed. 987, at p. 1002.

Digitized by Google

> the general conduct and the almost universal practice of the defendants and their agents was and is free from all methods and acts either unlawful, unfair, or oppressive towards their competitors, that it has left no doubt that the consistent and persistent purpose, policy, rule of action, and practice of the defendants has been and is to avoid and prevent all acts and methods unfair, unjust, or oppressive towards their competitors."[10]

Thus the question came before the court for the first time: Is a consolidation of competing industrial companies into one large corporation, resulting in the acquisition by that corporation of a large proportion of a certain field of business, necessarily invalid? The answer of the court in the Harvester case is in the affirmative when there is not sufficient excuse shown for the consolidation. And this is irrespective of the conduct of the corporation after the combination has taken place.

To realize the meaning of the Harvester Company decision it is necessary to examine briefly the recent cases arising under the Sherman Act. The first suit in which the Sherman Act was held to forbid the acquisition of competitive railway lines or industries by a single corporation was the Northern Securities case.[11] This case was decided by the lower court in 1903, and by the United States Supreme Court in 1904.[12] Prior to that time there had been but one suit brought under the Sherman Act against a large corporation in which the fact of combination into corporate form was alleged to be illegal. That was the case of United States v. E. C. Knight Company,[13] which action was lost by the government as the court held that the corporation in question was not engaged in interstate commerce.

From 1890 to 1903, therefore, the Sherman Act was applied solely to combinations of men or of corporations which remained independent of each other after the combinations were entered into. The agreements of manufacturers to pool their products and keep prices up, the combinations of railroads to share traffic and act in unison in ratemaking—the kind of agreements which, when in unreasonable restraint of trade, were illegal at common law—these were the agreements which were held illegal under the Sherman Act by the courts prior to 1903.

---

[10] 214 Fed. 987, at p. 1008.

[11] (1903), 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436.

[12] U. S. v. Northern Securities Co. (1903), 120 Fed. 721, on appeal (1904), 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436.

[13] (1894), 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. Rep. 249.

Digitized by Google

In the Securities case, three judges of the United States Supreme Court concurred with Mr. Justice Holmes in his opinion that the contracts in restraint of trade forbidden by the Sherman Act were "contracts with strangers to the contractor's business, and the trade restrained was the contractor's own". But the bare majority of the court held that the Northern Securities Company, a company holding the stocks of two competing railroad companies, was in itself a combination in restraint of trade under the Sherman Anti-Trust Act. With the Securities case, therefore, begins the history of the application of the Sherman Act to large corporations.

Between the date of the delivery of the Northern Securities decision and the handing down of the opinion in Standard Oil Company v. United States,[14] in 1911, the legality of nearly every large business house doing an interstate trade in America was open to doubt. In the Trans-Missouri case,[15] the Supreme Court had declared that all combinations which restrained trade, unreasonably or reasonably, were illegal. Now inasmuch as any consolidation of competing concerns into a corporation ended competition between them, under the broad theory of the law promulgated in the Securities case, all corporations made up of former competitors were illegal. It was not surprising that Mr. Justice Holmes spoke of the majority opinion in the Securities case as "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society."[16]

Judge Lacombe, rendering the opinion of the lower court in the Tobacco case, in 1908, made perfectly clear the seriousness of the broad holding in the Securities case. He said of the construction of the Sherman Act by the Supreme Court:

> "The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition and it would seem to make

---

[14] 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502.

[15] U. S. v. Trans-Missouri Freight Assn. (1896), 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540.

[16] U. S. v. Northern Securities Co. (1904), 193 U. S. 197, at p. 411.

Digitized by Google

> little difference whether they make such combination more effective by forming a partnership or not."[17]

When the Standard Oil and Tobacco cases came up on appeal the Justices of the Supreme Court had a choice—they could definitely hold that all combinations which restrained competition were illegal, in which event the Sherman Act would be so broad as to be practically unenforcible against all offenders and would remain a weapon to be used by the executive branch of the government at its caprice; or they could overthrow their ruling in the Trans-Missouri case and hold that combinations forbidden were combinations unduly in restraint of trade. The Supreme Court chose the latter course.

In the Standard Oil case the court held that the Sherman Act should be construed in the light of reason and, as so construed, it prohibited only contracts and combinations which amounted to an unreasonable or undue restraint of trade in interstate commerce. Of the effect of mere consolidation of the industry the court said:

> "Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce."[18]

This presumption was made conclusive by the proof developed of the specific acts of the Standard Oil Company showing its determination to drive its rivals out of business. So in the proceeding against the American Tobacco Company, the history of the combination was replete with acts "demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised

---

[17] U. S. v. American Tobacco Co. (1908), 164 Fed. 700, at p. 702.
[18] Standard Oil Co. v. U. S. (1911), 221 U. S. 1, at p. 75.

Digitized by Google

in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible".[19]

By the decisions in the Standard Oil and Tobacco cases, a great development was made in the law affecting combinations. All consolidations of competing plants were not illegal but such consolidations, if extended, made a prima facie case of illegality. And proof of the rough, harsh methods which at one time characterized the efforts of large companies to secure the business of their smaller rivals made the illegality conclusive. Combinations were henceforth to be adjudged in the light of reason and only combinations in undue restraint of trade to be forbidden. But this very method of judging the legality of corporations naturally left great uncertainty in the business world. Necessarily the standard of reasonableness was one on which men would differ. Few corporations could qualify as having indulged in all the practices condemned in the Standard Oil and Tobacco cases. As a result, a great number of large industrial corporations did not know in 1911, and do not know now, whether they are legal or illegal combinations of capital.

There are numerous precedents involving the validity of contracts between strangers which restrain trade. This subject has been before the common law courts for over a century. But for cases dealing with the validity of corporate consolidations, the person seeking enlightenment must look almost entirely to decisions arising under the Sherman Anti-Trust Act. And as the interpretation of the Sherman Act was radically changed by the court in the Standard Oil and Tobacco cases, it must be those cases and the subsequent decisions which must be examined.

Unfortunately since the Standard Oil and Tobacco cases, no decisions involving the validity of any large consolidations of industries in corporate form have been handed down by the Supreme Court. In recent cases that court has passed upon the legality of railroad combinations or of combinations of sundry independent dealers through agreement. Cases involving railroad combinations are most applicable to questions as to the validity of industrial combinations, when the offense complained of is the

[19]U. S. v. American Tobacco Co. (1910), 221 U. S. 106, at p. 181.

Digitized by Google

absorption of competing routes into a single corporation and not a mere agreement between independent carriers.

In the case of United States v. Union Pacific Railroad Company,[20] the Supreme Court handed down its most significant decisions viewed from the standpoint of industrial consolidation. Here the government tested the legality of the acquisition in 1901 of a controlling interest in the Southern Pacific Company by the Union Pacific Railway Company. It was shown that the competitive business prior to 1901 was under four per cent of the gross business of each road, although the receipts from that traffic ran into many millions. The lower court held that the combination was a legal one.[21] Judge Hook, however, filed a vigorous dissent. On appeal, the Supreme Court held that the acquisition of the stock was illegal and in violation of the Sherman Act.

It is to be hoped that the rather strict principles of this case are not to be applied to industrial corporations. The case closely follows the holding of the Northern Securities case. That railroad companies are in a class by themselves was brought out by Mr. Justice Brewer in his concurring opinion in the Securities case when he said:

> "It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly."[22]

If the decision simply affirms the Northern Securities case under the new view of the Sherman Act and means that combinations between competing lines of railroads are unlawful, the case has little bearing on industrial combinations. Should the case be construed as authority for holding that any consolidation between competing corporations, where the competitive business was so small as four per cent of the gross earnings of the companies, is illegal, the state of the law as applied to industrial corporations immediately becomes chaotic.

The Reading case[23] and the St. Louis Terminal case[24] throw

---

[20] (1912), 226 U. S. 61, 57 L. Ed. 97, 33 Sup. Ct. Rep. 1.
[21] U. S. v. Union Pacific R. R. Co. (1911), 188 Fed. 102.
[22] U. S. v. Northern Securities Co. (1904), 193 U. S. 197, at p. 363.
[23] U. S v. Reading Co. (1912), 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. Rep. 90.
[24] U. S. v. Terminal R. R. Assn. (1912), 224 U. S. 383, 56 L. Ed. 857, 32 Sup. Ct. Rep. 550.

Digitized by Google

little light upon the question of the legality of combinations of competing businesses in one corporation. Both cases involved agreements and combinations between competing but independent railroads. In the Reading case the railroads held proportionate interests in the stock of a colliery company, which controlled a great coal tonnage. This stock had been bought to head off the construction of an independent railroad from the coal fields to tide water. The railroads had also built up a system of contracts with the mining companies which gave the former a substantial control over coal prices. Both the common stock ownership and the system of contracts were held illegal. In the Terminal case control of the terminal facilities by a minority of the railroads compelled to use it was held a combination in restraint of trade.

The Bath Tub Trust case[25] and the Pacific and Arctic Railway and Navigation case[26] do not touch upon the legality of corporate consolidations. Combinations between independent dealers or carriers have been dwelt on at length by the common law judges and there is furthermore no compelling reason to believe that such combinations as those held illegal in the Addyston Pipe,[27] Montague,[28] Trans-Missouri[29] cases would not be held illegal today.[30]

There have been three cases since the Tobacco case decision in which the validity of large industrial corporations under the Sher-

---

[25] Standard Sanitary Mfg. Co. v. U. S. (1912), 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. Rep. 9.

[26] U. S. v. Pacific & Arctic Rv. & Nav. Co. (1912), 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. Rep. 433.

[27] Addyston Pipe & Steel Co. v. U. S. (1899), 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. Rep. 96.

[28] Montague & Co. v. Lowry (1904), 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. Rep. 307.

[29] U. S. Trans-Missouri Freight Assn. (1896), 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540.

[30] This, it is believed, is the natural deduction from an examination of the opinions of the Supreme Court rendered since the Standard Oil case and dealing with the Sherman act. Indeed, Mr. Justice Day, rendering the opinion in the Union Pacific case, said specifically of the "rule of reason" as applied in the Standard Oil and Tobacco cases: "In those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule and there was no suggestion that they had not been correctly decided." 226 U. S. 61, at p. 284. In the Standard Sanitary case the court treats the Montague decision as still a correct interpretation of the law. 226 U. S. 20, at p. 49. See also the Reading decision, 226 U. S. 324, at p. 370.

A recent decision of the District Court for the southern District of New York indicates that the judges of that court have doubts as to whether many of the decisions previous to the Standard Oil case are to be treated as the law today.

In U. S. v. Hamburg American S. S. Line et al. (October 13, 1914),

Digitized by Google

man act have been dealt with by the courts. One of these cases, United States v. Great Lakes Towing Company,[81] involved a corporation in many respects more like a railroad company than like an ordinary industrial corporation. Another case concerned the legality of the E. I. Du Pont de Nemours & Company[82] and the third was the International Harvester Company case.[83]

On June 21, 1911, the Circuit Court for the District of Delaware rendered the decision in the Powder Trust case. Circuit Judges Gray, Buffington and Lanning sat in the case. The court held that the E. I. Du Pont de Nemours & Company, which had gained control of sixty-four to one hundred per cent of the trade of the United States in the different kinds of explosives sold, was a combination in restraint of trade and illegal under the Sherman Act. But the powder company was not a "good trust" and it was manifestly illegal under the principles laid down in the Standard Oil and Tobacco cases. Judge Lanning, rendering the decision of the court, made this declaration of the law applicable to the defendant company:

> "It matters not whether the combination be 'in the form of a trust or otherwise', whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the Anti-Trust Act."[84]

In February, 1913, the decision in the case of United States v. Great Lakes Towing Company was handed down. Circuit Judges Warrington, Knappen and Denison of the Sixth Circuit sat in the action. The case involved the legality of a corporation

---

216 Fed. 971, the court passed upon the validity of an agreement of the North Atlantic Steamship Lines under which rates were fixed and proportionate allotments made in steerage and third class passengers. The court held in a comparatively short opinion that the agreement was a valid one in that it was a reasonable regulation of commerce. Much stress was laid upon a recent report of the Committee on Merchant Marine of the House of Representatives. In this report the agreement was reported reasonable and beneficial in that it eliminated the danger of disastrous rate wars. The court to sustain its opinion merely cites the Standard Oil and Tobacco cases and makes no mention whatsoever of the Trans-Missouri case.

[81] (1913), 208 Fed. 733.

[82] U. S. v. E. I. Du Pont de Nemours & Co. (1911), 188 Fed. 127.

[83] U. S. v. International Harvester Co. (August 12, 1914), 214 Fed. 987.

[84] 188 Fed. 127, at p. 151.

Digitized by Google

which acquired the property and good will of practically all local tug operators in fourteen of the principal lake ports, not including Lake Ontario. It was held that the corporation was in violation of the Sherman Act, for, as the court said:

> "It needs no discussion to demonstrate that complete unification of the towing and wrecking facilities at fourteen principal ports, accompanied by restraints with respect to competition imposed on the sellers of towing properties in excess of the legitimate protection necessary to preservation of the business purchased, excessive restrictions against competition under joint operating contracts and on sales of tugs, bitter rate wars, and a system of exclusive contracts with customers such as is found here, all adopted or engaged in for the purpose of effectuating monopolistic control, are abnormal methods of doing business and eliminating competition, and that a restraint of natural competition by such means is undue restraint."[35]

No one can fail to recognize, therefore, the importance of the Harvester case. It is the first decision in which the legality of a large but fair dealing industrial corporation has been tested. This company, because of the extent of its control of the harvester business, has been held to be illegal. If the principles set out in the opinion of the lower court are upheld in the Supreme Court, corporations manufacturing or selling over eighty per cent of the product in their line of business in the United States must prepare to dissolve. And their officers may look forward to criminal actions brought under the Sherman law. This does not mean that the illegal combination need be large from a standpoint of capital. It is the proportionate control of the field of competition that results in the violation of the law.

As pointed out in the Standard Oil case, it was held that the acquisition of a large number of competing plants by a corporation gives rise to a prima facie presumption of intent to dominate the industry through its powers acquired by combination. This prima facie presumption was made conclusive in the Standard Oil, Tobacco, Powder and Towing Company cases cited because of the unfair methods of competition used by those companies. The Harvester Company case in effect holds that if the new corporation is large enough after its acquisition of competing properties, evidence of good conduct does not overcome the presumption of illegality. The corporation is illegal in any event if

---

[35] 208 Fed. 733, at p. 744.

Digitized by Google

it controls too great a proportion of competitive business. No clues are given in the Harvester case as to how great a proportion of a competitive field of enterprise may be occupied by one corporation. It is true that the court distinguishes large consolidations from small consolidations when it says:

> "If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their unity would in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of their articles in America, if not in the world, and held jointly about eighty to eighty-five per cent of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade."[36]

But this implied permission can hardly be said to give much light to the industrial world. It recognizes as legal the consolidation of small enterprises under certain circumstances but suggests that even minor competitors cannot combine except when absolutely necessary. In what is perhaps the most striking portion of the court's opinion, it is said:

> "We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and as the companies named did in effect unite the sole question is as to whether they would have agreed on prices and what collateral services they should render, when their companies were all prosperous and they jointly controlled eighty to eighty-five per cent of the business in that line in the United States. We think they could not have made such an agreement."[37]

Such a test of legality is most discouraging to those who believe in the economies resulting from the doing of business in large units. The natural and great savings resulting from consolidations of industry would seem in such a test to be treated as of no consequence. If three companies can pool their products and agree upon prices they can consolidate, but they cannot do so otherwise. This would seem to be the meaning of the principle as applied. And this test may well threaten the smallest of com-

---

[36] U. S. v. International Harvester Co. (August 12, 1914), 214 Fed. 987, at p. 999.

[37] U. S. v. International Harvester Co. (August 12, 1914), 214 Fed. 987, at p. 999.

Digitized by Google

binations. The law has been considered settled that agreements between dealers having for their sole purpose the destruction of competition and fixing of prices, are injurious to the public interest and void.[88] Does the Harvester case result in all combinations being held illegal with the exception mentioned, when the concerns combining are small and combination is a necessity to fight a large corporation? This is a natural question resulting from the decision.

Nearly a quarter of a century has elapsed since the passage of the Sherman Anti-Trust Act. During that time the United States has gained tremendous strength as a power among nations. The same period has seen a world-wide development of consolidation in manufacturing industries because of the recognized economies of production in large units. But in America the Sherman Act, with its sweeping phrases, has threatened the legality of every large consolidation, irrespective of its purpose or effect. Sometimes the act has been construed to one effect and sometimes to another. And the man conceiving and developing any consolidation, no matter how fairly and for how much good to his country, has not known whether or not he was a criminal.

A great war in Europe has increased the relative importance of this country as an exporter of merchandise. Opportunities have arisen to extend the trade of America and to create markets for her products. Yet this year has seen Congress, after a long session, enact a trust program which leaves the Sherman Act as applied to industrial consolidations unchanged. And it has seen a decision rendered by a most able lower court in which the principles laid down menace the very existence of a great part of the large industrial corporations in this country. How can

---

[88] We have already commented upon the recent decision in the case of U. S. v. Hamburg American S. S. Line (Oct. 13, 1914), 216 Fed. 971, note 30 supra. As stated, the court in its opinion in that case relies solely upon the Standard Oil and Tobacco decisions. It does not treat of the validity of agreements to fix prices. In rendering the opinion of the lower court in the Standard Sanitary case Judge Rose said: "Some men believe that price agreements should be sustained by the courts, unless they are shown to be against the public interest. Others hold that they may be permitted only when it is affirmatively shown that they promote the public interest. Still others say that a price agreement pure and simple is always illegal. That the Supreme Court has declared the last of the above stated contentions to be the law is conclusive here. Only a few months ago it said: 'Agreements or combinations between dealers having for their sole purpose the

Digitized by Google

America, with her manufacturers thus handicapped, hope to compete with her full strength in the markets of the world?

May we not hope to see legislation which will recognize the desirability and the legality of combinations of industry which are designed, not to further abnormal competition, but to produce cheaply and to sell goods in large quantities on a small margin of profit? If such legislation is not forthcoming, is it too much to desire that the legality of large but fair dealing corporations will be clearly recognized in the courts? Surely we may expect a realization that the men who direct our industries are entitled to know what are and what are not combinations in restraint of trade. For from the business of this country naturally flows the prosperity of its people and, as President Wilson said in his message to Congress relating to Trust legislation, on January 20, 1914: "Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is."

Thomas A. Thacher.

San Francisco, California.

---

destruction of competition and the fixing of prices are injurious to the public interests and void.' Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911), 220 U. S. 373, at p. 408, 31 Sup. Ct. Rep. 384, 55 L. Ed. 502." U. S. v. Standard Sanitary Mfg. Co. (1911), 191 Fed. 172, at p. 182.

This decision was handed down in October, 1911, and the court considered the effect of the Standard Oil and Tobacco decisions. The Standard Oil opinion was rendered in May, 1911, and the Dr. Miles Medical Co. case in April, 1911. It seems incredible that the Standard Oil case is to be treated as overthrowing the Dr. Miles Medical Co. case in its doctrine as to the invalidity of price fixing. Until the Supreme Court itself definitely holds that price fixing agreements between sundry independent companies are valid, it is believed that the above statement of the law by Judge Rose is the correct one.

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year **Single Copies, 50 Cents**

A. M. KIDD, Editor-in-Chief
H. S. DON CARLOS, Student Editor-in-Chief
M. P. GRIFFITHS, Business Manager

Faculty Board of Editors

WM. CAREY JONES — A. P. MATTHEW
WM. E. COLBY — M. C. LYNCH
M. E. HARRISON

Student Board of Editors

ARTHUR ALLYN — LYMAN GRIMES
J. C. ALTMAN — O. F. MONTANDON
M. C. BAER — J. S. MOORE, Jr.
A. H CONARD — J. B. OLIVER
T. A. J. DOCKWEILER — J. D. RINEHART
G. H. GOBAR — E. J. SINCLAIR
G. W. WORTHEN

EDITORIAL NOTES

MEETING OF CALIFORNIA BAR ASSOCIATION

THE fifth annual meeting of the California Bar Association was held at Oakland on the days from November 19 to November 21. In addition to the president's annual address by Mr. William J. Hunsaker, of Los Angeles, on "The Courts, the Bar and the People", interesting papers were read by Chief Justice Sullivan on "The Law's Delays and Remedies Suggested", by Judge Walter Bordwell of Los Angeles, on "The Judges of our Courts", and by Mr. Walton J. Wood, the public defender of Los Angeles, upon "The Place of the Public Defender in the Administration of Justice". Mr. Charles S. Wheeler, of San Francisco,

Digitized by Google

delivered a notable eulogy, and United States District Judge Benjamin F. Bledsoe presented memorial resolutions upon our late Chief Justice Beatty.

One of the most important recommendations for suggested legislation was a law providing a simpler method of review of the judgments of the Superior Courts by the appellate courts. The proposed plan would permit the review upon appeal from the judgment of everything heretofore reviewable upon appeal from the order denying the motion for a new trial. Appeals from the latter order as from the order granting a new trial are to be abolished. In the interests of expedition, the trial court's power to act upon the motion for a new trial is to expire within three months from the date of the notice of the decision. The scheme is practically the same as that recommended by the association two years since, and owes its existence to the late Lester H. Jacobs.

The association again recommended the adoption of the Uniform Negotiable Instruments Law. There are now but five states, including California, in which ultra-individualism has successfully stood in the way of the adoption of this act. What California annually loses in the way of economic efficiency by reason of its eccentricities in this important branch of law is, of course, quite beyond the power of any statistician to estimate, but that it does suffer a considerable loss must be apparent to anyone who for a moment considers the highly developed and sensitive commercial system of our country. The association also recommended the adoption of the Uniform Sales Act and of the Uniform Bills of Lading Act.

It was interesting to notice the awakened interest taken by the bar in the matter of legal education. All agreed that a better system of examining applicants should be employed, but there was some dissent from the report of the section recommending a three years' period of study as a prerequisite to admission. The report of the section was, however, adopted, and the association again went on record in favor of the general plan recommended by the American Bar Association.

Mr. R. M. Fitzgerald, of Oakland, was elected president of the Association for the ensuing year. Mr. T. W. Robinson of Los Angeles, was re-elected as secretary.

Digitized by Google

Notes and Correspondence

IMPRISONMENT FOR DEBT

In 1911 the California legislature passed a law[1] in substance declaring that in case of an employee's discharge the balance of wages due him must be paid immediately, that in case he leaves his employment (not being under contract for a definite period) such balance must be paid within five days, that in all other cases wages must be paid at least monthly and not more than fifteen days after the end of the month, that any one violating any provision of the act "shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed $500." Arthur Crane violated a provision of this act; an information was laid against him before a police judge of San Francisco; a warrant was issued for his arrest; and he was jailed by the San Francisco police; all in accordance with the provisions of Title III of Part II of the Penal Code, relating to criminal procedure. Crane sued out a writ of habeas corpus in the District Court of Appeal for the First District, claiming that the wage law "in effect *permits* an imprisonment on mesne process for debt" in violation of that clause of article one, section fifteen, of the state constitution, which provides: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." In *Ex Parte Arthur Crane, on Habeas Corpus*[2] the court sustained his claim. In reaching this conclusion it said:

> "True, the statute does not provide imprisonment as the penalty for the failure of an employer to pay a debt due to his employee. The statute, however, is silent as to the process by which the magistrate before whom complaint is made of an alleged violation of the statute may obtain jurisdiction of the person of the offender. In the case at bar . . . the statute . . . was attempted to be enforced by the issuance and execution of a mesne process which . . . resulted in the temporary imprisonment of the petitioner, and the cause of his imprisonment is to be found primarily in the fact that he is unwilling or, perchance, unable to discharge a

---

[1] 1911 Stats. Cal. 1268.
[2] (Nov. 23, 1914), 19 Cal. App. Dec. 677.

Digitized by Google

> debt which was not conceived or contracted in fraud of his creditor. To this extent the arrest of the petitioner necessarily is in conflict with the fundamental law of the state."

Thus the appellate court argues that when the police court resorted to the procedure of the Penal Code to bring Crane to answer, and caused his arrest pursuant to the provisions of that code, it violated his constitutional rights; that because the wage law did not expressly prohibit resort to this unconstitutional procedure for its enforcement it also was unconstitutional. A mere statement of this argument in this condensed form shows its weakness. If every penal law was unconstitutional that did not by its terms expressly prohibit resort to unconstitutional methods for its enforcement, almost all penal statutes would be unconstitutional. If the constitutional right of an accused to a public and speedy trial was denied, or he was refused his constitutional right of counsel, according to this argument the penal statute he was accused of violating would itself be unconstitutional. The true rule, however, is that a penal statute is not unconstitutional or nonenforcible because it does not prescribe the needful procedure; that in such case the court may formulate its own procedure.[8] Power to do this is expressly given to courts by section 187 of the Code of Civil Procedure. Thus, conceding that the California statutes provide no constitutional procedure for the enforcement of the penal provisions of the wage law, the law is not thereby rendered either unconstitutional or nonenforcible; but it would be the duty of any court before which complaint was made of the violation of such penal provisions to establish a proper procedure for the enforcement thereof.

A more thorough consideration of the constitutional provision shows, however, that in fact the course taken by the police court did not violate any constitutional guaranty whatever. The distinction between criminal and civil actions is well known and primary. The constitutional prohibition is against imprisonment for debt "in civil actions". It has no relation whatever to criminal actions. Nor does the constitution directly or indirectly prohibit the legislature from declaring nonpayment of a debt a crime nor from punishing such crime by imprisonment on mesne or final process or both. The constitution is a limitation of power, not a grant, and the legislature has all power not expressly or by neces-

---

[8] People v. Jordan (1884), 65 Cal. 644, 4 Pac. 683; People v. Chew Lan Ong (1904), 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88.

Digitized by Google

sary implication taken from it. In In Re Diehl[4] this very point was before the District Court of Appeal for the Third District, and was decided in accordance with the distinction here made. P. Diehl had been imprisoned for crime under a city ordinance exacting certain business licenses, authorizing civil suits for their collection, and making nonpayment of any license when due a misdemeanor punishable by fine or imprisonment. He petitioned for a writ of habeas corpus, and made claim that "it is against the spirit and policy of the law to subject a person failing or refusing to pay the license . . . to penal punishment for the mere nonpayment of a debt." The court, in denying the writ, said:

> "We see no reason why such power should not be exercised consistent with the policy of the law against imprisonment for debt. We do not understand the penal clause of the ordinance before us to mean that one engaging in business upon which a license tax is imposed under the taxing power and refusing to procure the license required may be imprisoned until the license tax is paid. The misdemeanor consists in a refusal to obey the provisions of the ordinance, and the fine authorized to be imposed upon conviction is not intended as a payment of the license tax, but as a punishment for defying the commands of the ordinance."

Similarly, the wage law makes defying its commands a misdemeanor punishable by fine, but the imposition of such punishment upon an offender in no sense takes the place of the prompt payment of, and does not satisfy, the employee's demand.

That the constitutional guaranty against imprisonment for debt was not violated by the police court is further apparent from the context of the guaranty. The next clause of the section in which it is contained provides: "No person shall be imprisoned . . . in civil actions for torts, except in cases of willful injury to person or property." It is clear that this provision renders imprisonment unlawful in a civil action for negligent injury to person or property. Thus in a civil action to recover damages from the operator of an automobile who negligently runs down a pedestrian, the operator cannot be subjected to imprisonment; but no one has the temerity to argue that if the pedestrian dies from his injuries the operator could not be imprisoned for felony under section 192 of the Penal Code, notwithstanding the identical acts and transaction which constituted the civil wrong in the vindication of

[4] (1908), 8 Cal. App. 51, 96 Pac. 98.

Digitized by Google

which the operator could not be imprisoned also constituted the crime.

The decision of the District Court under consideration illustrates anew the dangers of our system of declaring laws unconstitutional. Oftentimes an insufficiently argued or insufficiently considered opinion forms an evil precedent which defeats the constitutional powers of the legislature. This is especially true in this state since the decision of the Supreme Court (by a divided court) that it has no power of rehearing in habeas corpus cases decided by the district courts. If the new practice of the First District Court in deciding cases from the bench results in many errors such as those manifest in this case, the sooner this new practice is abandoned the better.

Chas. M. Bufford.

San Francisco, California.

Digitized by Google

Comment on Recent Cases

ACT TO REGULATE CARRIERS: DISCRIMINATIONS AND PREFERENCES: CONNECTING CARRIERS.—Probably the most stubborn problem arising in connection with the regulation of carriers is the requirement of through routing arrangements and the interchange of traffic between connecting carriers. The United States District Court has rendered a decision in the case of *Pennsylvania Company v. United States (Interstate Commerce Commission et al., Interveners)*,[1] which is likely to accomplish the final settlement of the question. Complaint was preferred to the Interstate Commerce Commission by the Buffalo, Rochester and Pittsburgh Railway Company with a view to forcing the Pennsylvania Company which had entered into agreements for through routing and interchange of freight with three other roads, to make a similar arrangement with the Buffalo, Rochester and Pittsburgh. The Interstate Commerce Commission ordered the formation of such an agreement, and the Pennsylvania Company filed this bill to restrain the enforcement of the order. The District Court sustained the order, although there was a strong dissent by Circuit Judge Buffington.

The question presented in the case is a most complex one. At common law a carrier was not bound to enter into agreements for through routes or the interchange of traffic with connecting carriers, but if it chose to do so it might make such an agreement with one carrier to the exclusion of all others,[2] or it might extend certain facilities to one carrier while offering totally different ones to another. Paragraph two of section three of the Interstate Commerce Act as originally enacted provided that every common carrier subject to the act, should afford all reasonable, proper and equal facilities for the interchange of passengers and property between its lines and lines connecting therewith, and that it should not discriminate in its rates and charges between such connecting lines: but this obligation was qualified by the proviso that it should "not be construed as requiring any such common carrier to give the use of its tracks or terminal facili-

---

[1] (May Term, 1914), 214 Fed. 445.

[2] Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co. (1884), 110 U. S 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185.

Digitized by Google

ties to another carrier engaged in like business." In construing this section of the act the courts originally held, with a few exceptions, that a railroad company is not required to allow the same facilities for through traffic to all connecting lines, several federal cases holding that the act did not require a carrier entering into a through routing agreement with one connecting line to establish similar arrangements with another.[3] The commission, likewise, in a succession of cases decided that it had no power under the provisions of the act as construed by the courts, to compel carriers to enter into such agreements.[4] All of these decisions were rendered prior to the enactment of the Hepburn Amendment of 1906. That amendment gave the commission power, when necessary to give effect to any provision of the act, to establish through routes and maximum joint rates, provided no reasonable or satisfactory route had already been established. Adopting the reasoning of the cases decided prior to 1906 it would seem that this amendment introduced, or at least made effective, the requirement that a railroad company must extend the same facilities for through traffic to all connecting lines. It is difficult to reconcile these later cases, however, and it is too early to state conclusively just what obligation is imposed by the law as it now stands.

In its last analysis the solution of the problem depends entirely upon the construction of section three. If the section allows carriers to discriminate between connecting lines, the amendment has added nothing. But if it does forbid such discrimination, and has not been enforced merely because the commission has not had the power to establish through routes and joint rates, then the amendment adds vitality to the law. It is difficult to understand the purpose of the framers of the act, in inserting paragraph two of section three, unless it was to compel a carrier to treat all connecting lines equally in respect to through traffic agreements. To construe the act otherwise renders it absolutely of no effect, and it seems absurd to so construe affirmative legislation as to nullify its fundamental purpose.

The contention that the establishment of an involuntary traffic interchange amounts to a taking of tracks and terminal facilities, seems unsound. Under through routing agreements, connecting carriers do not acquire the use of another's tracks or terminals, as there is no invasion of the terminals by the locomotives of the

---

[3] Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co. (1894), 63 Fed. 775; Little Rock & M. R. Co. v. St. Louis I. M. & S. Ry. Co. (1894), 59 Fed. 400; Kentucky and Indiana Bridge Co. v. Louisville and N. R. R. Co. (1888), 2 I. C. C. 162.

[4] R. R. Com. of Ky. v. The Louisville & N. R. R. Co. (1904), 10 I. C. C. 173; Fred G. Clark Co. v. Lake Shore & M. S. Ry. Co. et al. (1906), 11 I. C. C. 558; The Diamond Mills v. Boston & Maine R. R. Co. (1902), 9 I. C. C. 311.

Digitized by Google

connecting company. In a recent case[5] the commission says that it can not assent to the argument that when a railroad is required to transport cars to and from another's terminals, it is giving that company the use of its tracks and terminals within the meaning of section three. It adds "The contention made by the defendant, if admitted, would completely nullify the power given the commission to establish through rates". While this decision is doubtless not in harmony with the weight of judicial authority as it now stands, it certainly seems to be a step in the right direction, and the principal case following so closely on its heels gives rise to the hope that the courts and the commission will eventually construe section three so as to give it a meaning instead of completely nullifying it.

A. H. C.

ADMIRALTY: AEROPLANE NOT A SUBJECT OF ADMIRALTY JURISDICTION.—The case of *The Crawford Bros. No. 2*[1] has the distinction of being the first attempt in this country to enforce in a court of admiralty a libel *in rem* against an aeroplane. The libeled air craft had fallen into the waters of Commencement Bay, and after its rescue, the libelant was employed to repair it, for which service he claimed a maritime lien.

It is difficult to perceive the theory upon which the libelant founded his claim for a maritime lien, unless it be the fact that, there being no general jurisdiction capable of dealing with all questions arising out of aerial navigation, courts of admiralty should take upon themselves the burden of solving all of these problems as they arise. The libelant insisted that the proposed code of aerial navigation, as adopted by the International Juridic Committee on Aviation,[2] shows a striking similarity to the laws governing navigation upon the seas, and that the two jurisdictions could well be exercised by one court.[3] But this theory overlooks the fundamental fact that courts of admiralty in this country are, by the federal constitution, only given jurisdiction over admiralty and maritime causes, and that for a case to be cognizable in admiralty, it must arise out of transportation and navigation upon waters within the court's jurisdiction.

The air craft in this case was exclusively non-aquatic, and totally incapable of navigation upon water. But one section of the proposed code of aviation contemplates the navigation by air craft, of the waters within the bodies of states, and should such

---

[5] St. Louis, S. and P. R. R. Co. et al. v. Peoria & Pekin Union Ry. Co. (1913), 26 I. C. C. 226.

[1] (June 27, 1914), 215 Fed. 269.

[2] (April 14, 1914), 18 Law Notes 5-7, 2 Docket 1161-1166.

[3] The possibility of adaptation of admiralty laws to aerial navigation is pointed out by Prof. Chessex in an article in 36 Clunet's Journal (1909), 681, 687, in which he suggests the allowance of a maritime lien for services in the nature of salvage, rendered to an aeroplane.

Digitized by Google

navigation become feasible for the purposes of transportation, it seems that admiralty jurisdiction should be held to extend to a tort committed by a hydro-air craft upon navigable waters; and, since it has been held that, if a craft is capable of being navigated upon water for the purposes of transportation, it is a subject of admiralty jurisdiction, irrespective of its size, form, capacity, or means of propulsion, in the case of a contract for the provisioning and equipping of a hydro-aeroplane, which was thus engaged, a nice question might be presented to a court of admiralty to determine whether the subject matter of this contract was maritime in its nature. But whatever questions may arise in connection with the use of hydro-aeroplanes, it is clear that in the principal case, no element of jurisdiction was present, and that the maintenance of a libel against the air craft was obviously impossible.

In its opinion in the principal case, the court suggests the possibility of an extension of admiralty jurisdiction through the aid of legislation, but it is clear that any such attempt would raise insurmountable constitutional difficulties. Even though no constitutional question were involved, an extension to aerial navigation of the maritime jurisdiction *in rem* would seem to be a matter of doubtful policy.[4]

The maritime lien, upon which the jurisdiction *in rem* is founded is an outgrowth of the necessities of commerce as carried on during a period when credit facilities and means of communication were little developed. Under such conditions, the ship itself was often the only security available for obtaining credit. But the necessities of commerce demanded that the ship should not be detained, and at the same time, financial considerations required that the ship should serve as security. To satisfy these conflicting demands, a lien divorced from possession was required. Today, though these necessities have to a large extent disappeared, the maritime lien still persists. Since these liens are secret, and are valid as against all the world without the necessity of recordation, it seems that their scope should be strictly limited to cases where the necessities of commerce have called them into existence, and should not be extended into other fields, where no necessity for their allowance exists.

J. D. R.

BILLS AND NOTES: NEGOTIABILITY AS AFFECTED BY PROVISIONS DESIGNED TO ADD SECURITY TO THE INSTRUMENT.—It has been said that a negotiable instrument is a "courier without lug-

---

[4] A code drafted by the American Bar Association contains no suggestion of depriving courts of general jurisdiction of control over aerial navigation. This code was not approved by the Association's committee on Jurisprudence and Law Reform, because not relating to a subject of sufficient present importance to warrant federal legislation. (1911), 36 Am. Bar Assn. Rep. 381.

Digitized by Google

gage", in other words a simple obligation passing freely from hand to hand, unincumbered with collateral agreements. While it is obviously undesirable to burden this courier with the impedimenta of a professional globe-trotter, still the modern commercial world demands a certain freedom in the way of security on such obligations without impairing negotiability. The problem, therefore, is, what amount of hand baggage can this courier carry on his travels? A partial answer to the question is found in the Washington case of *Bright v. Offield*,[1] decided under the Negotiable Instruments Law. In that case a note containing provisions permitting the holder to declare it due on default by the maker in payment of taxes or for any act by him impairing the value of the property mortgaged as security was held non-negotiable. Collateral security and accelerated maturity are permitted by the Negotiable Instruments Law, on the principle that a note payable at all events on a day certain is negotiable, though liable to mature sooner because of some act or default of the maker.[2] On the other hand a note is uncertain as to time of payment and non-negotiable if the holder may declare it due at his pleasure before its apparent maturity.[3] The court interpreted the provision for maturity if the maker should do anything to impair the security as falling within this latter rule.

The provision for accelerated maturity for non-payment of taxes was held to imply a promise to pay the taxes, not only on the land, which the mortgagor was bound to pay and which would not affect the negotiability of the note,[4] but also on the debt itself, which was held to be a collateral promise, uncertain as to amount and destructive of negotiability. These provisions were here in the note itself. A nicer question arises when they are contained in the mortgage, the note being silent thereon or merely referring to the fact of being secured by mortgage, and not making the mortgage "part of" the note. There are three lines of cases on the subject:

(1) Note and mortgage are construed together, the note being non-negotiable if the mortgage contains any provisions which, if in the note, would destroy negotiability.[5]

(2) Note and mortgage construed together only where the terms of one modify the other. The mortgage is merely security

---

[1] (Wash., Sept. 15, 1914), 143 Pac. 159.

[2] Thorpe v. Mindeman (1904), 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146.

[3] Holliday State Bank v. Hoffman (1911), 85 Kans. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390.

[4] Garnett v. Myers (1903), 65 Neb. 280, 94 N. W. 803.

[5] Brooke v. Struthers (1896), 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; Roblee v. Union Stockyards Nat. Bank (1903), 69 Neb. 180, 95 N. W. 61.

Digitized by Google

and the negotiability of the note is not affected by provisions looking to the preservation of the security alone.[6]

(3) Note and mortgage construed entirely apart. If the note is negotiable in itself it is not affected by any provisions in the mortgage, whether referring to the debt or the security, since they are not made part of the promise but are secured solely by the mortgage lien.[7]

The second class is the more widely followed but the third has the advantage of giving the fullest effect to the two instruments. It is subject to the criticism that instruments executed together are ordinarily to be construed together where the terms of one affect the other. California has even a stricter rule than that of the first class, all notes secured by mortgage, regardless of its terms, being non-negotiable.[8] In practically all the states the security may be disregarded and suit be brought on the note alone.[9] California, however, allows but one action on a debt secured by mortgage,[10] a provision which would have to be changed to give full effect to the Negotiable Instruments Law, which will undoubtedly be proposed at the forthcoming session of the legislature. Wherever the note is held negotiable the security, being ancillary to the debt, follows the note free from equities into the hands of a bona fide purchaser,[11] thus practically imparting negotiability to an otherwise non-negotiable instrument.

J. S. M., Jr.

CARRIERS: INJURY TO PASSENGER: BURDEN OF PROOF.—In *Steele v. Pacific Electric Railway Company*[1] the plaintiff was injured by falling to the ground while attempting to alight from defendant's car. The instruction to the following effect was held to be error: proof of injury to plaintiff on a car of defendant establishes for the plaintiff a prima facie case.

---

[6] Des Moines Sav. Bank v. Arthur (Iowa, 1913), 143 N. W. 556; Thorpe v. Mindeman, supra, note 2; Zollman v. Jackson Trust & Sav. Bank (Ill., 1909), 32 L. R. A. (N. S.) 858, n.

[7] Page v. Ford (Ore., 1913), 131 Pac. 1013, 45 L. R. A. (N. S.) 247. Thorpe v. Mindeman, supra, note 2, declined to pass on the question of whether provisions for payment of taxes on the note would render it non-negotiable.

[8] Meyer v. Weber (1901), 133 Cal. 681, 65 Pac. 1110; National Hardware Co. v. Sherwood (1913), 165 Cal. 1, 130 Pac. 881.

[9] Jones on Mortgages, § 1220; Brooke v. Struthers, supra, note 5.

[10] Cal. Code Civ. Proc., § 726; Meyer v. Weber, supra, note 8. It is doubtful whether this rule applies to other than mortgage security. It does not apply to notes secured by pledge, Ehrlich v. Ewald (1884), 66 Cal. 97, 4 Pac. 1062, and it has been suggested that it may not apply to trust deeds, Herbert Kraft Co. v. Bryan (1903), 140 Cal. 73, 73 Pac. 745.

[11] Frost v. Fisher (1899), 13 Colo. App. 322, 58 Pac. 872; Taylor v. American Nat. Bank (1912), 63 Fla. 631, 57 So. 678.

[1] (Oct. 1, 1914), 48 Cal. Dec. 254, 143 Pac. 718.

Digitized by Google

The plaintiff failed to distinguish between an injury due to defects in the appliances of the carrier, or to collision, on proof of which the burden is put upon the carrier of proving that he was not negligent,[2] and an injury due to some cause that is as well within the knowledge and control of the plaintiff as of the defendant, in which case it is necessary that the plaintiff show that the injury was caused by some negligent act of the defendant.[3] The principal case was of the latter type, and the burden of proof did not devolve upon the defendant until the plaintiff had herself shown that the injury was occasioned by a fall caused by the negligent starting of the car by defendant.[4] No presumption of negligence arises from the mere fact that the passenger was injured.[5]

F. L. F.

CONSTITUTIONAL LAW: COMMERCE CLAUSE: STATE REGULATION OF RATES FOR DISTRIBUTION OF NATURAL GAS DRAWN IN PART FROM OTHER STATES.—The United States District Court for the Northern District of West Virginia holds, in *Manufacturer's Light and Heat Company v. Ott*,[1] that a state may regulate charges for the sale of natural gas, notwithstanding that the supply is drawn in part from other states. The court avoids a definite ruling as to the pertinence of the commerce clause, but contents itself with deciding that, in any event, the subject-matter is not within the exclusive control of Congress. The case is apparently one of first impression.

It is a fundamental principle of constitutional law that Congress has exclusive power over commerce among the states where the subjects upon which the power is exerted are "in their nature national, or admit only of one uniform system or plan of regulation".[2] Without this field is a large, ill-defined area of legislative authority within which the states, may, in the absence of conflict-

---

[2] MacDougall v. Central R. R. Co. (1883), 63 Cal. 431; McCurrie v. Southern Pac. Co. (1898), 122 Cal. 558. 55 Pac. 324; Boone v. Oakland Transit Co. (1903), 139 Cal. 490, 73 Pac. 243; Kline v. Santa Barbara Consol. Ry. Co. (1907), 150 Cal. 741, 90 Pac. 125; Denver & Rio Grande Ry. Co. v. Fotheringham (1902), 17 Colo. App. 410, 68 Pac. 978; North Chicago St. R. R. Co. v. Schwartz (1899), 82 Ill. App. 493.

[3] Chicago Union Traction Co. v. Straud (1904), 114 Ill. App. 479; Chicago City Ry. Co. v. Catlin (1897), 70 Ill. App. 97; Bartley v. Metropolitan St. Ry. Co. (1899), 148 Mo. 124, 49 S. W. 840; Lincoln Traction Co. v. Shepherd (1905), 74 Neb. 369, 104 N. W. 882, 107 N. W. 764; Griffen v. Manice (1901), 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925; Saunders v. Chicago etc. Co. (1894), 6 S. D. 40, 60 N. W. 148.

[4] Chicago City Ry. Co. v. Catlin (1897), 70 Ill. App. 97.

[5] Wyatt v. Pacific Electric Ry. Co. (1909), 156 Cal. 170, 103 Pac. 892.

[1] (July 29, 1914), 215 Fed. 940.

[2] Cooley v. Board of Wardens (1851), 12 How. 299, 13 L. Ed. 996; Cook v. Penn. (1878), 97 U. S. 566, 24 L. Ed. 1015; Leloup v. Port of Mobile (1888), 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. Rep. 1380.

Digitized by Google

ing congressional action, assert their police power with respect to matters of local concern, although interstate commerce be incidentally affected.[3] A state may not competently grant exclusive rights to engage in interstate commerce within its waters.[4] A state may not prescribe rates for the carriage of interstate freight, even for such portion of the route as lies within its borders.[5] A state may not impose penalties upon common carriers for failure to furnish cars for the movement of interstate traffic.[6] A state may not require the stoppage of interstate trains at local points, provided that adequate provision for state traffic has been made.[7] A state may not enact legislation which will prohibit the transportation of commodities produced within its borders to points beyond.[8] These, and matters of correlative dignity, are cognizable by the federal authority alone. On the other hand, state legislation forbidding the heating of passenger cars by ordinary coal-stoves has been upheld, even as to equipment employed in interstate traffic.[9] A state statute forbidding the movement of freight trains, interstate as well as intrastate, on Sunday has been sustained.[10] State legislation regulating the delivery of interstate telegraph messages transmitted to points within its limits is valid.[11] A state can fix the rates for grain elevator storage, even though interstate shipments of grain pass through the elevators.[12] Enactments relating to the liability of common carriers for loss or damage to freight are within the tentative authority of the state.[13] Perhaps the extreme limits of the power of the states over commerce have been

---

[3] Machine Co. v. Gage (1879), 100 U. S. 676, 25 L. Ed. 754; Brown v. Houston (1885), 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Cardwell v. Bridge Co. (1885), 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. 423; Morgan's Steamship Co. v. Louisiana Board of Health (1886), 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. Rep. 1114; Plumley v. Massachusetts (1894), 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. Rep. 154.

[4] Gibbons v. Ogden (1824), 9 Wheat. 1, 6 L. Ed. 23.

[5] Wabash etc. Ry. Co. v. Illinois (1886), 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. Rep. 4

[6] Houston and Texas Central R. R. Co. v. Mayes (1906), 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. Rep. 491.

[7] Cleveland, Cincinnati, Chicago and St. L. Ry. Co. v. Illinois (1900), 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722; Herndon v. Chicago, Rock Island & Pac. Ry. Co. (1910), 218 U. S 135, 54 L. Ed. 970, 30 Sup. Ct. Rep. 633.

[8] Oklahoma v. Kansas Natural Gas Co. (1911), 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. Rep. 564.

[9] N. Y., N. H. and Hartford R. R. v. New York (1897), 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418.

[10] Hennington v. Georgia (1896), 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. Rep. 1086.

[11] Western Union Telegraph Co. v. James (1896), 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. Rep. 934; Western Union Telegraph Co. v. Crovo (1911), 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. Rep. 399.

[12] Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77.

[13] Richmond and Alleghany R. R. Co. v. Patterson Tobacco Co. (1898), 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. Rep. 335; Missouri,

Digitized by Google

set by the decisions sustaining state-made rates for local ferry service in interstate[14] and foreign commerce.[15]

These citations will serve to characterize the nebulous field of concurrent powers, within which the state may act in the absence of conflicting federal action. If it be assumed that the regulation of rates for the distribution of natural gas originating in part beyond the state's borders has any relation to interstate commerce, doubt could not well be entertained as to its essentially local character. There is not presented a direct regulation of interstate commerce, within the doctrine of the ruling cases.[16] No interference with the transfer of a commodity from one state to another is attempted.[17] No discriminatory practice is involved.[18] It would seem, therefore, that the regulation of rates for local gas service is within the authority of the state, irrespective of the source of supply.

It is submitted that the commerce clause does not embrace the local distribution of gas or electricity. The service afforded is not one of transportation; the transit of the supply has preceded distribution to the consumer. Such interstate commerce as may have been involved in rendering the supply available has been determined prior to the commencement of the service which the state has assumed to control. That the state is acting within its proper province would seem to be beyond controversy.

H. J. W.

CONTRACTS: ARBITRATION.—A Washington case, *Herring-Hall-Marvin Safe Company v. Purcell Safe Company*,[1] holds that where there is an agreement to arbitrate all disputes, failure to arbitrate or to offer to arbitrate is a good defense to a suit upon the contract. In thus holding executory arbitration agreements

---

Kansas and Texas Ry. Co. v. McCann (1899), 174 U. S. 580, 43 L. Ed. 1093, 19 Sup. Ct. Rep. 755.

[14] Port Richmond and Bergen Point Ferry Co. v. Freeholders of Hudson County (June 8, 1914), 234 U. S. 317.

[15] City of Sault Ste. Marie v. International Transit Co. (June 8, 1914), 234 U. S. 333.

[16] Railroad Co. v. Husen (1877), 95 U. S. 465, 24 L. Ed. 527; Bowman v. Chicago and N. W. Ry. Co. (1888), 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. Rep. 689; Brimmer v. Rebman (1891), 138 U. S. 78, 34 L. Ed. 862, 11 Sup. Ct. Rep. 213; Schollenberger v. Pennsylvania (1897), 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. Rep. 757; People v. Hawkins (1898), 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490.

[17] Oklahoma v. Kansas Natural Gas Co. (1911), 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. Rep. 564.

[18] Brown v. Maryland (1827), 12 Wheat. 419, 6 L. Ed. 678; Welton v. Missouri (1875), 91 U. S. 275, 23 L. Ed. 347; Webber v. Virginia (1880), 103 U. S. 344, 26 L. Ed. 565; Walling v. Michigan (1886), 116 U. S. 446, 29 L. Ed. 691, 6 Sup. Ct. Rep. 454; Voight v. Wright (1891), 141 U. S. 62, 35 L. Ed. 638, 11 Sup. Ct. Rep. 855; People v. Hawkins (1895), 85 Hun. 43, 32 N. Y. Supp. 524.

[1] (Sept. 17, 1914), 142 Pac. 1153.

Digitized by Google

binding to the extent of ousting the jurisdiction of the courts of the subject matter of the contract the Washington courts are opposed to authority.

At common law an arbitration agreement could not be used as a bar to an action, while in equity it could neither be specifically enforced nor used as a bar to the suit. It was considered contrary to public policy to permit the courts to be ousted from their jurisdiction of the subject matter of dispute by a private contract.[2] As the courts have grown in strength and security they have grown less jealous of infringement upon their jurisdiction. There is some authority for allowing at least nominal damages for a breach of an arbitration agreement.[3] Since the Common Law Procedure Act of 1854 in England it has been possible to enforce an arbitration agreement at the discretion of the court by staying the hearing of the dispute as to the subject matter. But the right to oust the jurisdiction of the court at the defendant's pleasure by setting up the arbitration agreement as a defense has been withheld.[4] If arbitration has been made a condition precedent, a failure to arbitrate will bar an action on the subject matter of the contract, but a general arbitration agreement will not be considered a bar to an action on the contract before an actual award is made.[5] In a series of cases in Washington the courts have held that conditions precedent, such as appraisal clauses, bar a suit on the contract, at the same time they have said by way of dictum that any arbitration agreement might be a bar to a suit on the subject matter. In the principal case the court seems to have gone in its decision to the extent of the former dictum.[6]

California has provided in its code[7] that the submission to arbitration may be made an order of court; if it is not thus made, it may be revoked at any time before the award; but where an

---

[2] Southern Pac. Co. v. Denton (1892), 146 U. S. 202, 36 L. Ed. 942, 13 Sup. Ct. Rep. 44; Grievance Committee v. Brown (1894), 61 Fed. 541; Tobey v. County of Bristol (1845), Fed. Cas. No. 14,065, 3 Story 800.

[3] Livingston v. Ralli (1855), 5 El. & Bl. 132; Nute v. Hamilton Mutual Ins. Co. (1856), 6 Gray 174, 182; Haggart v. Morgan (1851), 5 N. Y. 422.

[4] Williston's Wald's Pollock on Contracts, 3rd ed., pp. 445-447; Page, Contracts, pp. 535-536.

[5] Low v. Fisher (1886), 27 Fed. 542; The Excelsior (1887), 123 U. S. 40, 31 L. Ed. 75, 8 Sup. Ct. Rep. 58; Perkins v. U. S. Electric Light Co. (1881), 16 Fed. 513.

[6] Hughes v. Bravinder (1894), 9 Wash. 595, 38 Pac. 209; Van Horne v. Watrous (1895), 10 Wash. 525, 39 Pac. 136; Lidgerwood Park Waterworks Co. v. Spokane (1898), 19 Wash. 365, 53 Pac. 352; Herman v. Plummer (1898), 20 Wash. 363, 55 Pac. 315; Zindorf Construction Co. v. Western American Co. (1901), 27 Wash. 31, 67 Pac. 374; Childs Lumber Co. v. Page (1902), 28 Wash. 128, 68 Pac. 373; Winsor v. German Savings & Loan Society (1903), 31 Wash. 365, 72 Pac. 66; North Coast R. Co. v. Kraft Co. (1911), 63 Wash. 250, 115 Pac. 97; State ex rel. Noble v. Bowlby (1913), 74 Wash. 54, 132 Pac. 723.

[7] Cal. Civ. Code, § 1283.

Digitized by Google

award is duly made it may be enforced.[8] This jurisdiction distinguishes between conditions precedent and independent conditions; the former may bar an action even though the condition is one requiring arbitration.[9] For the enforcement of an arbitration agreement in California as a condition precedent, the number of arbitrators, the exact method of their selection, and the manner of making an award must all be definitely provided for in the agreement, and the agreement strictly followed.[10]

E. B. B.

CRIMINAL LAW: REVERSAL FOR DEFECT IN INDICTMENT.—In the case of *People v. Allison*[1] the defendant was indicted, tried and convicted for the commission of the infamous crime against nature by carnal knowledge of one Frank B. Love. The conviction was reversed because the indictment failed to allege that Frank B. Love was not a female and therefore failed to negative the possibility that the sexual intercourse may not have been against nature. The court does not refer to the evidence at all although the evidence undoubtedly shows that Frank B. Love was a male person, so we have the discouraging result of a reversal of the conviction of a guilty man on a technicality.

Centuries ago when the criminal law was being made by the judges, when the protection afforded by modern constitutional guarantees did not exist and when there was no appeal from the verdict of a jury, it was necessary that the indictment should set out the specific facts constituting the crime with the greatest particularity to prevent men from being tried and convicted for acts which were really not crimes at all. In these days, however, where the procedure so carefully safeguards the defendant and where each crime is defined by statute and judicial decisions, what reason can be advanced for the reversal in the principal case? If the evidence had not shown the commission of a crime the judgment would have been reversed on appeal. If any doubt at all existed in the defendant's mind as to whether or not the act with which he was charged constituted a crime he could easily have obtained by demurrer, a statement of sufficient particularity to raise a question of law. It is well known that the constitutional

---

[8] Sidlinger v. Kerkow (1889), 82 Cal. 42, 22 Pac. 932; California Academy of Science v. Fletcher (1893), 99 Cal. 207, 33 Pac. 855; Matter of Sillman and Carr (1911), 159 Cal. 155, 113 Pac. 135.

[9] Cal. Conference of M. E. Church v. Seitz (1887), 74 Cal. 287, 291, 15 Pac. 839; Holmes v. Ritchet (1880), 56 Cal. 307, 38 Am. Rep. 54; Loup v. Cal. So. R. R. Co. (1883), 63 Cal. 97; Scammon v. Denio (1887), 72 Cal. 393, 14 Pac. 98; Wakeham v. Barker (1889), 82 Cal. 46, 22 Pac. 1131; Tubbs v. Delillo (1912), 19 Cal. App. 612, 127 Pac. 514.

[10] Saucelito L. & D. Co. v. Commercial U. A. Co. (1884), 66 Cal. 253, 5 Pac. 232; Case v. Insurance Co. (1889), 82 Cal. 263, 22 Pac. 1083; In re Abrams and Brennan (1905), 2 Cal. App. 237, 84 Pac. 363; Dore et al. v. Southern Pacific Co. (1912), 163 Cal. 182, 124 Pac. 817.

[1] (Nov. 13, 1914), 19 Cal. App. Dec. 608.

Digitized by Google

amendment of 1911[2] was the result of the agitation aroused by a reversal for a defect in an indictment. The folly of such reversals has been generally agreed upon by judges and lawyers. If the constitutional amendment can not be applied to defects in indictments when cured by the evidence, the exact situation which gave rise to its adoption,[3] and if cases are still to be reversed on the mechanical precedents existing before the amendment, one may well feel that judicial perversity in the application of technicalities is incurable by the ordinary methods of legislation or constitutional amendment.

A. M. K.

FRAUD: EXECUTORY CONTRACT OF SALE: RIGHT OF VENDEE TO AFFIRM CONTRACT AND SUE ON THE FRAUD.—Where A, by fraud, induces B to enter into a contract to purchase land from him to be paid for in installments, and B pays one installment, enters, and then discovers the fraud, what are his rights? It is to be observed that the injury here consists not in breach of contract, nor of warranty. The fraud is strictly collateral to the contract; and the only right of action at law to which it can give rise is an action on the case in deceit, sounding not in contract but in tort. Law, however, as well as equity, recognizes the further principle that such fraud may render the contract voidable at the election of the injured party. His possible courses of action may be catalogued as follows:

(1) He may offer to rescind the contract, and tender back the land. He is then entitled, (a) to recover the installment paid, (b) to recover special damages, such as, for example, money expended for improvements, and (c) to secure a decree in equity annulling the contract, and other relief where appropriate.

(2) He may affirm the contract, keep the land, and sue his vendor for damages in an action on the case in deceit for the fraud. Prerequisite to his recovery, he must either show full performance or tender full performance to date, but need make no tender of amounts not yet due.[1] It is submitted that this is

---

[2] Cal. Const. art. vi, § 4½: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[3] People v. Carroll (1905), 1 Cal. App. 2, 81 Pac. 680. Incidentally it may be noted that in the principal case the name of the crime was correctly stated in the indictment, which was not the case in People v. Carroll, a circumstance relied upon by the court in its decision in that case.

[1] Hines v. Brode (Oct. 3, 1914), 48 Cal. Dec. 333, 143 Pac. 729, affirming with modifications, Hines v. Brode (June 12, 1914), 18 Cal. App. Dec. 117. Comment on latter in 2 Cal. Law Rev. 333.

Digitized by Google

entirely logical and just. The rule of damages applied is that he may recover a sum equal to the value of the land had the fraudulent representations been true, less (a) the value of the land as it actually is, and (b) the unpaid balance of the contract price. In addition he is entitled to special damages.[2] His affirmation of the contract is no waiver of past damages.[3]

The rule of damages above stated is a source of difficulty. A concrete example under it certainly challenges question. In *Hines v. Brode,* cited above, the defendant, who had by means of fraud concerning water rights persuaded the plaintiff to agree to buy his land for $2000, and collected about $300 thereof, now, after discovery by the plaintiff of the fraud, finds himself bound, not only to lose the land, but also to pay the vendee $4000 in addition.

Carry the case one step further, and assume that the plaintiff had paid one dollar, or nothing at all down, and had merely entered; he would, according to the rule, be still entitled to keep the land, and recover an amount equal to the value of the land as represented, less the sum of the actual value and the price unpaid. If the represented value was $4000, the actual value $400 and the contract price $300, a portion of which has been paid down, we have the curious result that (1) the less paid down (actual damage) the more the vendee recovers, and (2) his largest possible recovery will occur where he has parted with not a single cent. It is evident that this rule of damages is not consonant with the old familiar rule that a plaintiff must aver actual damage before he states a cause of action in deceit.

It is, however, established beyond argument in California as in most jurisdictions that a rule of damages based upon the value of the land were it as represented, is the proper one for an action in deceit. It is submitted that therefore the rule of the principal case is under the circumstances as logical as any that can be devised.

Some jurisdictions in this country base their rule of damages not on the represented value, but on the pecuniary loss actually incurred by the vendee. In such jurisdictions there is no logical objection to granting the vendee his damages for losses up to the moment of discovering the fraud. It is a curious fact, however, that every case found which recognizes in its decision such a right,[4] was decided in a jurisdiction following the California rule of damages.

O. F. M.

---

[2] Hines v. Brode, supra.

[3] Hines v. Brode, supra. Contra, 2 Cal. Law Rev. 333; Ponder v. Altura Farms Co. (Colo., Oct. 5, 1914), 143 Pac. 570.

[4] See cases cited in Hines v. Brode, and comment thereon, 2 Cal. Law Rev. 333.

Digitized by Google

INTOXICATING LIQUORS: STATUTORY INTERPRETATION.—The feeling in favor of prohibition and against the demon rum has become so strong in Kansas that it has even affected the minds of the judiciary; so that their interpretation of statutes savors of legislation. In the case of *State v. Miller*[1] a druggist was found guilty of violating the intoxicating liquor statute, by selling Jamaica ginger. The statute of 1881 defining intoxicating liquors reads,[2] "All liquors mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act." There was a proviso,[3] reading, that such liquors may be sold for medical, scientific and mechanical purposes as provided in the act. The only change made by the 1909 amendment, under which this case was decided, was to omit the proviso.

The able opinion of Judge Brewer[4] interpreting the statute of 1881 was overthrown by the opinion in this case. To his mind the use of intoxicating liquors as a beverage was the evil, and the statute must be read in that light. It intended to put a stop to such use, and limit alcoholic preparations to the necessities of medicine. So he divided the cases into three classes. The first embraced what are generally and popularly known as intoxicating liquors unmixed with other substances, as brandy for instance. The second included standard, well known articles which while containing alcohol are never classed as intoxicating beverages and their uses are confined to culinary, medical or toilet purposes. The third class embraces compound preparations in which alcohol is present; these may be purely medicinal in their purpose and effect, or mere substitutes for the usual intoxicating beverages as some patent medicines, cordials and tonics. The first class (in Judge Brewer's view) falls within the statute, the second, without, and the third is a question of fact for the jury. The effect of the present decision is to place the second and third classes in one, making it a question of fact for the jury or the court when sitting as a trier of the facts.

According to this opinion such preparations as tincture of gentian, paregoric, bay rum, cologne and essence of lemon are intoxicating liquors. Even though a witness drink part of a bottle of essence of cinnamon as one did in State v. Muncey,[5] and, "became so affected that he could not see after night"; why should thousands of housewives be deprived of this valuable seasoning? Under this decision ladies must forego cologne, as

---

[1] (July 7, 1914), 142 Pac. 979.
[2] 1901 Gen. Stat. Kansas, § 2460.
[3] Kan. Laws 1909, c. 164, § 4.
[4] Intoxicating Liquor Cases (1881), 25 Kan. 751, 37 Am. Rep. 284.
[5] (1886), 28 W. Va. 494.

Digitized by Google

they cannot get a physician's prescription for it or file an affidavit that they require the same for scientific or mechanical purposes. So instead of leaving to the legislature for determination whether it should be a misdemeanor to sell any tinctures and compounds containing a certain percentage of alcohol, the courts themselves have legislated. They have so legislated notwithstanding the fact that the legislature could, by appropriate words, have evidenced its disapproval of Judge Brewer's classification of 1881.

There should be no need to prove what bread is and for what purpose it is used. There should be no more need in respect to what whiskey or gin is[6] on the one hand or cologne or bay rum on the other. The court should take judicial notice of their uses and the character of these articles as in United States v. Ash,[7] where the court says, "that it would neither stultify itself nor impeach its own veracity by telling the jury that it had no judicial knowledge that the drink commonly known as the whiskey cocktail is an intoxicating drink, but that on the contrary it would assume judicial knowledge that it is intoxicating." Common sense should be used in the interpreting of a statute and it should be remembered that the statute in question was not the result of a crusade against the extract of cologne or the essence of lemon. Plowden[8] says: "It is not the words of the law but the internal sense of it that makes the law. And the law may be resembled to a nut which has a shell, and a kernel within. The letter of the law represents the shell and the sense of it the kernel, and you will be no better for the nut if you make use only of the shell." Apparently the Kansas court overlooked the kernel.[9]

L. G.

MASTER AND SERVANT: UNLAWFUL EMPLOYMENT OF CHILD IN RELATION TO WORKMEN'S COMPENSATION ACT.—In *Hillestad v. Industrial Insurance Commission of Washington*[1] the parents of a child sued the commission under the Workmen's Compensation Act for the amount due for the death of the child. The child was below the age requirement of the Child Labor Laws and was working for his father; for these reasons the court refused to allow the claim, holding that the father could not recover upon his own negligence or wrong. This is in accordance with the view that the employment of a child under statutory age is an act of negligence.[2] It would, perhaps, be more accurate to say that it is

---

[6] Black on Intoxicating Liquor, ch. 1, § 8.

[7] (1896), 75 Fed. 651.

[8] Note to Eyston v. Studd (1574), 2 Plow. 465.

[9] A decision of this kind would probably not affect dry districts in California, as the Local Option Act of 1911 carefully draws the distinction between alcoholic liquors used as beverages and those used for other purposes. 1911 Stat. Cal. 599.

[1] (Wash., July 14, 1914), 141 Pac. 913.

[2] Rolin v. Reynolds Tobacco Co. (1906), 141 N. C. 300, 53 S. E.

Digitized by Google

such fault as will render the employer liable for death of, or injury to, the child irrespective of negligence, provided that such wrongful employment is the proximate cause of the injury. There is no reason why this doctrine should not be applied to the Workmen's Compensation Acts as it was in this case, and the father denied a recovery for his fault in employing his child contrary to law. It seems probable that the decisions under the Workmen's Compensation Act will follow the common law doctrine that the "negligence" is that of the employer rather than that of the child, and thus permit a recovery by the child, or, in the event of his death, by his administrator.[3] The court recognized this in the principal case by a dictum to the effect that if the child had been suing his employer, instead of the father suing the commission, he would have recovered, and this view would seem to be correct.

But in order to support a recovery in such a case, an employment of the child must be found. In the principal case the court held that the statute contemplated an "actual contractual relation between the parties. That is, an agreement to labor for an agreed wage or compensation," or, in other words, an express, as opposed to an implied, contract, and the court accordingly held that as the parties said nothing about any wage or compensation there was no express contract of employment and therefore could be no recovery. The relation of master and servant, which is obviously that contemplated by the statute, exists when one person is willing to work for another from day to day, and that other person desires the labor.[4] This is especially true because an employee, in the absence of an express agreement as to wages, can recover on an implied promise to pay.[5] A more valid objection to finding an employment here would be on the ground of relationship of the parties, but in reference to this the Washington courts hold the liberal view that an implied contract is sufficient basis for an action for wages.[6] The same view is adopted by the California decisions.[7] It is therefore submitted that the statute does not sustain the ruling that recovery can only be had when there is an express contract between the parties.

C. W. S.

MINING LAW: KNOWN LODES WITHIN PLACERS.—The question as to what constitutes a known lode within a placer under

---

891, 7 L. R. A. (N. S.) 335; Queen v. Dayton Coal & Iron Co. (1895), 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82.

[3] Marino v. Lehmaier (1903), 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, affirming 62 App. Div. 43, 70 N. Y. Supp. 790; Wise v. Morgan (1898), 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

[4] Frank v. Herold (1901), 63 N. J. Eq. 443, 52 Atl. 152.

[5] White v. Dougherty (1910), 1 Boyce (Del.) 355, 76 Atl. 609.

[6] Morrissey v. Faucett (1902), 28 Wash. 52, 68 Pac. 352; Hodge v. Hodge (1907), 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873.

[7] Friermuth v. Friermuth (1873), 46 Cal. 42; Crane v. Derrick (1910), 157 Cal. 667, 109 Pac. 31.

Digitized by Google

section 2333 Revised Statutes of the United States is an involved one and its proper solution has been difficult for the courts. As a result the decisions can not be entirely harmonized.

The case of Iron Silver Mining Company v. Reynolds[1] was one of the earliest on this subject. There the court laid down the rule that "knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for the patent; or by tracing the vein from another lode; or perhaps from the general conditions and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact."

During the same year the case of United States v. Iron Silver Mining Company[2] was decided, and the court laid down the stringent rule that "It is not enough that there may have been some indication by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

A few years later the case of Iron Silver Mining Company v. Mike Starr Company[3] arose where the court said "It is enough that it [the vein or lode] be known either to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to anyone making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government. . . . . An applicant for a placer patent is chargeable with all that would be disclosed by a casual inspection of the surface of the ground or such a tunnel."

There was a strong dissenting opinion on the ground that "the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."

These three cases illustrate the fluctuation of opinion that has taken place. The first case lays down an exceedingly lenient rule, the second case is extremely strict, while the last cited case again reverts to the more lenient rule but with a strong dissenting opinion against such liberality.

The recent case of *Mason et al. v. Washington Butte Mining*

---

[1] Iron Silver Mining Co. v. Reynolds (1887), 124 U. S. 374, 31 L. Ed. 466, 8 Sup. Ct. Rep. 598.

[2] U. S. v. Iron Silver Mining Co. (1888), 128 U. S. 673, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195.

[3] Iron Silver Mining Co. v. Mike Starr Co. (1891), 143 U. S. 394, 36 L. Ed. 201, 12 Sup. Ct. Rep. 543.

Digitized by Google

Company[4] again recognizes the more stringent rule. Two quartz claims had been located covering the land in controversy prior to the date of application for placer patent made by a placer claimant of the same ground. The lode locators adversed the placer application but finally compromised the suit and allowed judgment to be rendered in favor of the placer locator. After the issuance of the placer patent, five new quartz claims were located by strangers to the earlier titles and embracing the ground in controversy, being a part of the patented placer claim involved in the earlier adverse suit. There were two questions before the court: (1) Whether the judgment in the adverse suit was *res adjudicata* in determining that there were no veins or lodes known to exist in the land at the time of the application for the placer patent; and, (2) whether the mere sinking of shafts on the early lode claims constituted such notice to the placer applicant that he may be said to have had or could be presumed to have had knowledge of an existing vein or lode within the boundaries of his placer claim, so as to except the same from the operation of the patent. The court answered both questions in the negative. In regard to the first it said, "the judgment had not the effect to determine that there were not within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for the patent, and it has no bearing upon the question of validity of subsequent locations, the rights whereof depend on the question whether, at the time when the placer patent was applied for, there were known veins or lodes such as to be excluded from the grant of the patent."

As to the second question it laid down the rule that "before it can be held that veins or lodes are excluded from the grant of land included in a placer patent, it is not sufficient to show that the land does in fact contain valuable minerals, but it must be shown that at the time of the application for the patent, more has been discovered than the indications of mineral which would ordinarily sustain a lode location, and that it was at that time known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises, for the purpose of obtaining title from the government, that there was rock in place bearing minerals of such extent and value as would justify expenditures for the purpose of extracting them."

At one time it was customary for the land department to insert in all placer patents a clause excepting any vein or lode claimed or known to exist at the date of the placer patent. This has, however, been held to be an unwarranted extension of the statute by these officials, since the word "claimed" is not contemplated and

---

[4] (May 4, 1914), 214 Fed. 32.

Digitized by Google

also because sometimes a year or more elapses between the date of the patent application and the date of the actual issuance of the patent.[5]

W. J. A.

MINING LAW: POLICE POWER OF STATE TO REGULATE MINES.—In the various states in which mining thrives, statutes have been enacted to preserve the health and promote the safety of persons working in and about, or in connection with the mines, and also for conserving the public safety, prescribing penalties for their violation. Reasonable regulations have been generally sustained as constitutional and as a valid exercise of the police power.

Two cases on this subject recently came before the Supreme Court of the United States, it being alleged in both that the statutes in question were unconstitutional as opposed to the fourteenth amendment of the federal constitution. In *Barrett v. State of Indiana,*[1] the court held that the statute of Indiana requiring entries into bituminous coal mines to be of a specified width, was within the police power of the state and constitutional. And in the case of *Plymouth Coal Company v. Commonwealth of Pennsylvania,*[2] the court held "that a statute of Pennsylvania requiring owners of adjoining coal properties to cause barrier pillars to be left of suitable width to safeguard employees is not unconstitutional either as depriving the owners of their property without due process of law or as denying them equal protection of the law, or because of the procedure and method prescribed for determining the width of such barrier or because it delegates the matter to an administrative board or does not provide for any appeal thereupon."

The court in both cases said that the business of coal mining is a dangerous business and therefore subject to regulation. This is in accord with the holding of the court in an earlier case, that of St. Louis Consolidated Coal Company v. Illinois,[3] where it was said "the regulation of mines and miners, their hours of labor, and the precautions that shall be taken to ensure their safety, health, and comfort, are so obviously within the police power of the several states, that no citation of authorities is necessary." But the police power cannot be put forward as an excuse for oppressive and unjust legislation.[4] As it was held in Barrett v. State of Indiana,[5] the legislature of the state is itself the judge of the means neces-

---

[5] Sullivan v. Iron Silver Mining Co. (1891), 143 U. S. 431, 36 L. Ed. 214, 12 Sup. Ct. Rep. 555. Also see Burke v. So. Pac. Co. (1914), 234 U. S. 669, 34 Sup. Ct. Rep. 907, 921.

[1] (May 26, 1913), 229 U. S. 26, 57 L. Ed. 1050, 33 Sup. Ct. Rep. 692.

[2] (Feb. 24, 1914), 232 U. S. 531, 34 Sup. Ct. Rep. 359.

[3] (1902), 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616.

[4] Davidson v. New Orleans (1877), 96 U. S. 97, 24 L. Ed. 616. See also, Yick Wo v. Hopkins (1885), 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064.

[5] (May 26, 1913), 229 U. S. 26, 57 L. Ed. 1050, 33 Sup. Ct. Rep. 692.

Digitized by Google

sary to secure the safety of those engaged in a dangerous business, and only such regulations as are palpably arbitrary can be set aside as violating the due process provision of the fourteenth amendment. "A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."[6]

To the objection in Barrett v. State of Indiana that the statute is in violation of the equal protection clause of the fourteenth amendment in that it applies to bituminous coal mines alone, the court answers that "this is not so unreasonable or arbitrary as to justify the courts in overruling the legislature. Courts will not interfere . . . unless it appears that there is no fair reason for the law that would with equal force not require its extension to others whom it leaves untouched."

While to the objection in Plymouth Coal Company v. Commonwealth of Pennsylvania, that the statute provides for taking of property without due process of law because it provides that the width of the pillar is to be determined by the engineers of the adjoining property owners together with the inspector of the district, the court answers that "this method is not so crude, uncertain or unjust as to constitute a taking of property without due process of law". It would, as is apparent, be impracticable for the legislature to fix an arbitrary width for all pillars alike and it was therefore justified in leaving this determination to an administrative board. This is in line with the holding of the above cited case of St. Louis Consolidated Coal Company v. Illinois.[7] Though a case dealing primarily with the inspection of mines, it nevertheless illustrates the point that the legislature may leave the determination of certain details to a body of men to be appointed in a manner provided by the legislature. It held that "in enacting a law with regard to the inspection of mines, we see no objection, in case the legislature finds it impracticable to classify the mines for the purpose of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but are acquainted with the details necessary to be known to make a reasonable classification, etc."

W. J. A.

PERSONS: LEGITIMACY: WHAT ARE MARRIAGES NULL IN LAW UNDER SECTION 1387, CALIFORNIA CIVIL CODE.—An apt illustration of the dangers attendant upon codification is the important concluding sentence of section 1387 of the Civil Code: "The issue of all marriages null in law, or dissolved by divorce, are legiti-

---

[6] Lawton v. Steele (1894), 152 U. S. 133, 136, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499.

[7] (1902), 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616.

Digitized by Google

mate." The difficulty lies in ascertaining the meaning of apparently plain language.[1]

Admittedly, there is force in the paradoxical contention that a marriage "null in law" means a voidable marriage—one which in its legal effects is valid until duly annulled by proper proceedings, when it becomes void *ab initio*, as distinguished from a "marriage" absolutely void from the beginning, the form or ceremony of marriage having been enacted without resulting in the status or relation of marriage.[2] Thus it is argued that the sentence in section 1387 is substantially the re-enactment of a provision adopted into the law of this state in 1850, which read: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate";[3] that marriages "deemed null in law" were then "dissolved by divorce", the latter term signifying the annulment of voidable marriages, as well as the dissolution of valid ones, but not the judicial declaration of void marriages;[4] and that the provision in the act of 1850 (there being no other statute like section 84 of the Civil Code) was intended to save the legitimacy of children of voidable or annulled marriages, who, after the annulment, would otherwise be illegitimate.[5] Moreover, it is pointed out that derivatives of the word "null", "nullity", "annulment", and the like are consistently employed in the Civil Code with reference solely to voidable marriages, and that void marriages are therein designated "void".[6] Stress, also, is laid on the supposed absurdity of treating the word "marriages" in the last clause of section 1387 in any sense other than status. But these considerations have not prevailed. In *Estate of Shipp*[7] the sole question was a child's right to inherit as his father's legitimate heir. A marriage between the father and the child's mother had been solemnized by an authorized person in 1909, the parties being capable of entering matrimonial contract, and the solemnization regular in every way except for want of a license. The woman believed that a license had been duly issued, and assumed marital relations in good faith, thinking she was a wife. The child was born of this union in 1911. Granting, without

---

[1] Perhaps there is no better discussion of the construction of this provision than in the briefs and arguments of counsel in Estate of Baldwin (1912), 162 Cal. 471, 123 Pac. 267.

[2] As to voidable and void marriages, see Linebaugh v. Linebaugh (1902), 137 Cal. 26, 69 Pac. 616; Estate of Gregorson (1911), 160 Cal. 21, 116 Pac. 60; Coats v. Coats (1911), 160 Cal. 671, 118 Pac. 441.

[3] Act "to regulate Descents and Distributions", 1850 Stats. Cal. 219, Comp. Laws Cal. 1850-1853, ch. 42, p. 186.

[4] See act "concerning Divorces", 1851 Stats. Cal., 186, Comp. Laws Cal. 1850-1853, ch. 116, p. 371; 2 Bishop, Marriage, Divorce and Separation, § 473. Also Dunphy v. Dunphy (1911), 161 Cal. 87, 118 Pac. 445.

[5] Coats v. Coats (1911), 160 Cal. 671, at pp. 675, 676; Bl. Com., Cooley's ed., bk. i, ch. 16, pp. 457, 458.

[6] Compare Cal. Civ. Code, §§ 82-86 with §§ 59, 60, 61 and 80.

[7] (Oct. 15, 1914), 48 Cal. Dec. 444.

Digitized by Google

deciding, that lack of a license invalidated the marriage, the Supreme Court held the child legitimate and entitled to inherit as the issue of a marriage null in law, and distinctly rejected, as too narrow, that construction of the phrase which would include only voidable marriages, those subject to annulment on grounds exclusively specified in section 82 of the Civil Code. "The section", said the court, referring to section 1387, "should be liberally construed[8] and held to apply to an attempted marriage, contracted in good faith, so far, at least, as one of the parties is concerned, where there is a concurrence of the elements of marriage, as defined in section 55 of the Civil Code; that is to say, where there has been the consent of parties capable of making a contract of marriage followed by a solemnization authorized by the code."

While the decision leaves open to question whether the enactment legitimates offspring of marriages illegal and void because incestuous[9] or miscegenetic,[10] it is to be noted that the statute confers legitimacy on "the issue of all marriages null in law". Having now construed "marriages null in law" to mean void marriages are any such without the scope of the provision? With respect to marriages between persons one of whom is already married, which are illegal and void under certain circumstances,[11] it is clear, that, if the court's construction be the correct one, the case disposes of a proposition advanced, but not passed upon, in Estate of Baldwin,[12] that such a marriage cannot be a marriage "null in law", and the issue, therefore, legitimate, because the married party being incapable of consenting to another marriage, the ceremony or form of marriage created no matrimonial status or relation. The court's view in the principal case repudiates a legislative intent to use the word "marriages" in this connection, in the restricted sense of status. But as far as judicial determination in this state goes, Graham v. Bennett,[13] decided under the Act of 1850 and fortified by the Supreme Court's latest ruling, would seem to be controlling to the effect that the issue of a void bigamous marriage may be legitimate by virtue of section 1387.[14] In other jurisdictions similar statutes have been so interpreted, even long before the legislature of 1850 came into session.[15] Indeed, bearing in mind

---

[8] Citing Blythe v. Ayres (1892), 96 Cal. 532, 582, 31 Pac. 915, 924, 19 L. R. A. 40.

[9] Cal. Civ. Code, § 59; Cal. Pen. Code, § 285.

[10] Cal. Civ. Code, § 60.

[11] Id., § 61.

[12] Supra, note 1.

[13] (1852), 2 Cal. 503.

[14] Obiter dicta to contrary in Estate of Wood (1902), 137 Cal. 129, 131, 132, 69 Pac. 900, 901; Estate of Harrington (1903), 140 Cal. 244, 248, 73 Pac. 1000, 1001, 98 Am. St. Rep. 51.

[15] Sneed v. Ewing (1831), 28 Ky. 460, 22 Am. Dec. 41; Workman v. Harold (Ky., 1887), 2 S. W. 679; Buchanan v. Harvey (1864), 35 Mo. 276; Green v. Green (1894), 126 Mo. 17, 28 S. W. 752; Wright v. Lore

Digitized by Google

the general kindly attitude of our law towards illegitimates, and looking at the unfortunate plight of the children, is it unreasonable that they should have been intended to share the benefits of legitimacy provided by the above section, where, at any rate, either, or both, of their parents entered matrimony in good faith and ignorant of existing impediments to valid and lawful marriage?[16]

T. A. J. D.

PLEADING: PROMISSORY NOTES: ALLEGATION OF NON-PAYMENT.—It is a well settled rule in California, that, in actions upon money demands, including actions upon promissory notes, the complaint must aver non-payment as a breach in a distinct form, or it will fail to state a cause of action.[1] It is useless at this late day to discuss the merits of this rule, as it is firmly established.[2]

Although it is a rule easily complied with, there has been considerable litigation to determine just what is a sufficient allegation of non-payment. It was early pointed out that a mere statement that a certain sum is due and owing will not stand the test of a demurrer,[3] but that such an allegation is sufficient in the absence of a demurrer and after judgment.[4] It is conceded that such an averment is a statement of a conclusion of law, rather than of an ultimate fact, but such faults are cured by judgment.[5] It has been held to be a reversible error, however, to overrule a general demurrer to such a complaint.[6] Although the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur,[7] apparently the interposition of a general demurrer will have the effect of saving a point for appeal which would otherwise become unavailable after judg-

---

(1861), 12 Ohio St. 619; Stones v. Keeling (1804), 5 Call (Va.) 143; Heckert v. Hile's Adm'r (1894), 90 Va. 390, 18 S. E. 841; Watts v. Owens (1885), 62 Wis. 512, 22 N. W. 720. These cases, especially Buchanan v. Harvey, show the length to which courts have gone in favor of legitimacy. But where there was not even an attempt to marry in legal form the issue has been held not to be legitimated by the statute. Walker's Estate (1896), 5 Ariz. 70, 46 Pac. 67; Keen v. Keen (1904), 184 Mo. 358, 83 S. W. 526.

[16] There is analogy in the putative marriage of Spanish law. See Gaines v. Hennen (1860), 24 How. 553, 16 L. Ed. 770; Gaines v. New Orleans (1867), 6 Wall. 642, 18 L. Ed. 950; Lee v. Smith (1856), 18 Tex. 142.

[1] Dodge v. Kimple (1898), 121 Cal. 580, 54 Pac. 94; Bank of Shasta v. Boyd (1893), 99 Cal. 604, 34 Pac. 337; Pomeroy's Code Remedies, 4th ed., § 576; Hudelson v. First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304.

[2] Richards v. Lake View Land Co. (1897), 115 Cal. 642, 47 Pac. 683.

[3] Frisch v. Caler (1862), 21 Cal. 71.

[4] Stewart v. Burbridge (1909), 10 Cal. App. 623, 102 Pac. 962.

[5] Penrose v. Winter (1901), 135 Cal. 289, 67 Pac. 772.

[6] Knox v. Buckman Contracting Co. (1903), 139 Cal. 598, 73 Pac. 428.

[7] Cal. Code Civ. Proc., § 434.

Digitized by Google

ment.[8] It should be noted, in this connection, that an allegation that money is due and owing, although a conclusion of law, is one in which a material fact is implied, and theoretically should be taken advantage of by special demurrer.[9]

In the case of *Poetker v. Lowry*,[10] the complaint contained an allegation "that the defendant has refused and still refuses to pay" the note. A general demurrer to the complaint was overruled, and, after trial and judgment for the plaintiff, the judgment was reversed on the ground that there was no allegation of non-payment. It is submitted that the decision is incorrect and in direct conflict with the case of Bliss v. Sneath,[11] in which an allegation in the same words was held sufficient against a general demurrer. Although the averment in question is not a conclusion of law in which a material fact is directly inferable,[12] it is at least a defective statement of the essential fact of non-payment, and vulnerable only to a special demurrer.[13] Averments that the defendant "has failed, neglected and refused",[14] or has "neglected and refused" to pay have been held good in the absence of special demurrer.[15] In such cases there is a defective and improper statement of material facts, not an entire absence of necessary allegations.[16]

In the principal case we have, at best, a reversal on a mistaken technicality, since the defense interposed by the defendant was lacking in merit. Even if the decision were technically correct it could scarcely be sustained upon a liberal view of the code system. It is to be hoped that the recent amendment to section four and one-half of article four of the constitution,[17] relating to the miscarriage of justice in civil actions, will in the future avoid the necessity of such technical decisions and their inevitable mistakes.

A. A.

PUBLIC LAND LAW: JURISDICTION OF LAND DEPARTMENT.—The accepted rule in this country is that the courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the Land Department. There is one exception to this rule, jurisdiction in questions of law, which Judge Lindley[1] in his book

---

[8] Knox v. Buckman Contracting Co., supra, note 6; Wells, Fargo & Co. v. McCarthy (1907), 5 Cal. App. 301, 308, 90 Pac. 203.

[9] Burke v. Dittus (1908), 8 Cal. App. 175, 178, 96 Pac. 330.

[10] (Oct. 22, 1914), 19 Cal. App. Dec. 523.

[11] (1894), 103 Cal. 43, 36 Pac. 1029.

[12] Stewart v. Burbridge, supra, note 4.

[13] Grant v. Sheerin (1890), 84 Cal. 197, 199, 23 Pac. 1094; Scroufe v. Clay (1886), 71 Cal. 123, 11 Pac. 882.

[14] O'Hanlon v. Denvir (1889), 81 Cal. 60, 22 Pac. 407.

[15] Rankin v. Sisters of Mercy (1889), 82 Cal. 88, 22 Pac. 1134; Gardner v. Donnelly (1890), 86 Cal. 367, 24 Pac. 1072; Irwin v. Insurance Co. (1911), 16 Cal. App. 143, 116 Pac. 294.

[16] Richards v. Travelers' Ins. Co. (1889), 80 Cal. 505, 507, 22 Pac. 939.

[17] Senate Const. Amend. 12, Amendments and Proposed Statutes, Nov., 1914, p. 3.

[1] Lindley on Mines, 3rd ed., § 666.

Digitized by Google

on mines expresses as follows: "They [the courts] have a right to investigate rulings made by the department, a right which in the absence of fraud or imposition does not exist where only questions of fact are involved." An illustration of this principle is to be found in the case of *Sanders v. Dutcher*,[2] where the California Supreme Court reversed the findings of the United States Land Department recognizing defendant's homestead entry, and granted relief to plaintiff whose claim was based on a Desert Land entry.

On first appeal the commissioner had rejected the plaintiff's Desert Land claim on the grounds that she had not personally done the work required, and that she had contracted to sell the claim before she had made the final proofs. The mistake as to the first ground is self-evident. The second is a clear mistake of law, as there is no legal principle which forbids such a contract or which declares the title received thereunder invalid. A contract to sell land before title vests is against the policy of the law only in those cases where such policy is specifically declared by the law. It is so stated in the Homestead Act and the land officer was apparently laboring under the misapprehension that the provisions of that act applied here. The court reversed the officer's decision and made the plaintiff in this case the trustee for the defendant, and directed that any title obtained by the plaintiff should be conveyed to the defendant.

If the general rule as to Land Office appeals be strictly construed, the plaintiff would have no remedy. To supply this very need it is now settled that in this class of cases there exists in the courts of equity,[3] both state and federal, the jurisdiction to correct mistakes and relieve against frauds and impositions. The usual remedy for mere errors in judgment upon the weight of evidence in a contested case before the commission, is appeal from one officer to another of the department with a last resort to the President.[4] Remembering that in dealing with the public domain Congress decides upon private rights of great value, and that these dealings are ex parte and peculiarly liable to the influence of frauds, false swearing and mistake, justice demands that the courts give a remedy. There is no reason why the actions of the Land Department should not be subject in these cases to a court of equity, which since its creation has had the power to

[2] (Sept. 30, 1914), 48 Cal. Dec. 213.

[3] Baldwin v. Starks (1882), 107 U. S. 463, 27 L. Ed. 526, 2 Sup. Ct. Rep. 473; Gage v. Gunther (1902), 136 Cal. 338, 68 Pac. 710; Moore v. Robins (1877), 96 U. S. 530, 24 L. Ed. 848; Shepley v. Cowan (1875), 91 U. S. 330, 23 L. Ed. 424.

[4] Powers conferred on the officers of the Interior Department by U. S. Rev. Stat., § 453; Pengra v. Munz (1887), 29 Fed. 830; Whitcomb v. White (1909), 214 U. S. 15, 53 L. Ed. 889, 29 Sup. Ct. Rep. 599; De Cambra v. Rogers (1903), 189 U. S. 119, 47 L. Ed. 734, 23 Sup. Ct. Rep. 519.

Digitized by Google

inquire into and correct mistakes, injustice and wrongs in both the judicial and the executive departments.

This case is especially interesting in view of the recent attempts to secure congressional action establishing a Court of Land Appeals. The Department of the Interior has recognized this need by securing provision in the Sundry Civil Appropriation Bill for the salaries of certain law officers who are to assist the Secretary of the Interior in deciding important questions of law. This is a step in the right direction as there exists a crying need for a court of last appeal for the Land Department.

The inconsistent rulings of the Land Department point to the desirability of securing certainty in decisions by substituting a permanent court of lawyers in the place of administrative officers who are forced to depend on administrative law clerks.

L. G.

SALES: CONDITIONAL SALES: LOSS ON SELLER.—The question as to whether the loss due to the destruction of goods during the existence of an agreement of conditional sale should fall upon the seller or the buyer has often been presented to the courts. In such agreements it is expressly provided that the title to the goods shall remain in the vendor until payment of the full price by the vendee, but the vendee is given the possession and use of the goods in the meantime. The authorities are in conflict on the question of responsibility for loss but the majority view places the loss upon the conditional buyer.[1]

The question apparently has never been decided by the courts of appeal in California before the case of *Waltz v. Silviera.*[2] In this case the court decided that the loss should fall upon the seller. The court did not discuss the matter at length nor refer to any previous decision upon the point in this jurisdiction. The opinion was based on the rule that risk follows title. That is the rule in case of ordinary sales and contracts to sell; the risk there follows the property.[3] The situation is different in the case of conditional sales since the seller retains title merely to secure payment of the price. The reasons for holding that the loss should fall upon the buyer rather than the seller have been suggested by many cases which are ably discussed by a learned author in his treatise on sales.[4] The Uniform Sales Act puts the loss upon the buyer. It is hard to see why this court in passing upon a question, apparently for the first time, should fix the law of this state contrary to the

---

[1] Chicago Ry. Equipment Co. v. Merchants' Bank (1890), 136 U. S. 268, 34 L. Ed. 349, 10 Sup. Ct. Rep. 999; Phillips v. Hollenberg Music Co. (1907), 82 Ark. 9, 99 S. W. 1105; Tufts v. Griffin (1890), 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; Williston on Sales, § 304.

[2] (Nov. 9, 1914), 19 Cal. App. Dec. 598.

[3] Potts Drug Co. v. Benedict (1909), 156 Cal. 322, 324, 104 Pac. 432.

[4] Williston on Sales, §§ 304, 330, 331, 334, 571.

Digitized by Google

weight of authority and the better reasoning. The buyer has the possession of the property and the seller cannot refuse to transfer title on payment of the price.[5] It has also been decided that the benefit of increase goes to the conditional buyer.[6] "Though payment be a condition precedent to the vesting of legal title, it is not a condition precedent to the vesting of a right of property in the buyer, called in the cases a 'special property'. The transaction is, therefore, properly called a conditional sale, not a conditional contract to sell."[7]

The contract in the principal case imposed a duty upon the vendee to return the safe to the vendor in good order in any event. By suing for the price the court under the established rule held that the seller had waived his right to make a claim based upon his right to possession.[8]

By this decision the buyer's right under a conditional sale must be looked upon as a mere contract right and the seller must be considered as the owner of the property. The seller can sue for the price in the event of destruction of the goods only when the contract expressly provides that the loss shall fall upon the buyer.

M. C. L.

STATE OF INSURRECTION: POWER OF MILITARY UNDER EXECUTIVE PROCLAMATION.—The Governor of Montana issued his proclamation to the effect that the county of Silver Bow was in a state of insurrection, under martial law, and under the jurisdiction of the military authorities. One McDonald was seized by the military and detained as a ring leader of the insurrection. One Gillis was arrested for resisting a military officer, tried by a military court, and sentenced to a fine and imprisonment. Both applied to the Supreme Court of the state for a writ of habeas corpus. For the petitioners it was urged that the executive proclamation accomplished, and could accomplish, no more than adding the military to the police force of the state with the same powers that peace officers have in putting down a riot, and no more. Against the granting of the writ it was argued that the proclamation of the Governor created martial law, meaning thereby "No law except the sword, unsheathed and uncontrolled". No court has ever sanctioned the theory that the arbitrary will of the military commander can be substituted for the law of the land, except in the theater of actual military operations in case of war against a belligerent,

---

[5] Carpenter v. Scott (1881), 13 R. I. 477, 479; Chase v. Ingalls (1877), 122 Mass. 381, 383; Crompton v. Pratt (1870), 105 Mass. 255, 258.

[6] Anderson v. Leverette (1902), 116 Ga. 732, 42 S. E. 1026; Allen v. Delano (1869), 55 Me. 113, 92 Am. Dec. 573; Bunker v. McKenney (1875), 63 Me. 529; Clark v. Hayward (1877), 51 Vt. 14.

[7] Williston on Sales, § 330.

[8] Parke etc. Co. v. White River Lumber Co. (1894), 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing (1895), 109 Cal. 353, 42 Pac. 435; Muncy v. Brain (1910), 158 Cal. 300, 110 Pac. 945.

Digitized by Google

recognized as such and asserting rights of sovereignty in political form. Between these two extremes, one of which limits the authority of the military in a time of insurrection to that of policemen and the other which exalts it to the despotic power of the commander of an army in the field, the cases show much difference of opinion.

It has been held that a qualified martial law exists which justifies the establishment of military lines and the posting of sentries with power to shoot as in time of war.[1] It has been held that the ring leaders and fomenters of a state of insurrection may be arrested and detained without trial until the danger is over. No court has gone further than that of West Virginia where the majority apparently sustained the substitution of military tribunals for the civil courts in the trial of past and present offences, at least during the continuance of the executive proclamation.[2]

In the principal case, *Ex parte McDonald et al. In re Gillis*,[3] the court, in an able opinion by Mr. Justice Sanner, justified the detention of those instigating riots but condemned the attempted trial by the military court. The writ of habeas corpus was refused in both cases as the military were held justified, while the proclamation was in force, in refusing to liberate the petitioners or turn them over to the civil authorities for trial, but the court made it plain that military tribunals for civilians were illegal. Trial by jury and the other constitutional guaranties cannot be superseded by executive proclamation. Misleading notions on this subject arise from the use of the term "martial law". As the principal case points out, martial law cannot exist in time of peace. A strike may be dangerous but it is not war. Where the law on this subject has been codified the situation is usually correctly defined as a state of insurrection.[4] Martial law has no place in strikes or other calamities. Such conditions as those existing during the San Francisco fire,[5] the Dayton flood, and the West Virginia mining strikes are unfortunately of too frequent occurrence. Peace must be kept but the situation is a difficult one. The state owes it to its citizens who are struggling for what they regard as their rights and owes it to those who bear arms in its defense to define more accurately than

---

[1] Commonwealth ex rel. Wadsworth v. Shortall (1903), 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.

[2] State ex rel. Mays v. Brown (1912), 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N.S.) 996; Ex parte Jones (1913), 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N.S.) 1030.

[3] (Mont., Oct. 8, 1914), 143 Pac. 947.

[4] Cal. Pol. Code, §§ 1917 et seq.

[5] It is, perhaps, unnecessary to state that the proclamation of Mayor Schmitz was no justification to any one acting under it, and that General Funston's participation with the federal troops in subordination to the Mayor was in direct contravention of an Act of Congress. See Prof. Ballantine in 1 Cal. Law Rev. 413. In this article and in the principal case many authorities are collected.

Digitized by Google

has been done, just how far the military have a right to go. It is conceded that the courts cannot go behind the Governor's proclamation that a state of insurrection exists. If the power under this proclamation is greatly extended, our constitutional guaranties become a scrap of paper.

A. M. K.

SURETYSHIP: CONSTRUCTION OF CONTRACTS OF A SURETY COMPANY.—The difficulty involved in applying the ordinary rules of suretyship to the case of corporations engaged in the business of acting as sureties for profit, is well shown by a decision rendered by the Supreme Court of Kansas in the case of *School District v. Massachusetts Bonding & Insurance Company.*[1] Suit was instituted by the school district to recover on the bond of the defendant company, which insured the performance of a building contract, one of the terms of the contract being that the work should be completed before a specified date. The bond provided that no liability should attach to the surety, unless, in the event of default of the principal, the school district should give notice to the surety immediately upon knowledge thereof and not later than thirty days after default. The work was not completed within the time specified, but no notice was given as provided. The court ruled that since the company had suffered no loss by the failure to receive notice, it was not released from liability on the contract. Mr. Justice West dissented on the ground that the parties had contracted that no liability should attach unless notice was given and that such notice was a condition precedent, performance of which was necessary for recovery.

Ordinarily, under the general rules of suretyship, any material alteration of the contract releases the surety from liability, applying the maxim that "a surety is a favorite of the law". Where, however, as in the above case, the surety undertakes the obligation for profit, it is not entitled to such tender consideration and its contracts are not governed by the rule of *strictissimi juris,* but any ambiguity in the contract is construed in favor of the other party.[2] In fact such surety contracts are interpreted much like insurance contracts, since they are drawn by the company and hedged about by conditions and requirements, which should estop the company from asserting a right to have ambiguous terms construed in its favor, as against any reasonable construction acted upon by the

---

[1] (April 11, 1914), 142 Pac. 1077.

[2] Baglin v. Title Guaranty & Surety Co. (1909), 166 Fed. 356; Atlantic Trust & Deposit Co. v. Town of Laurinburg (1908), 163 Fed. 690, 90 C. C. A. 274; United States Fidelity & Guaranty Co. v. United States (1910), 178 Fed. 692, 102 C. C. A. 192; United States Fidelity & Guaranty Co. v. United States (Guaranty Co. v. Pressed Brick Co.) (1903), 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142.

Digitized by Google

other party to the contract. This doctrine is supported by the great weight of authority.[3]

The doctrine must not, however, be extended so as to override the express terms of a contract. In the principal case the condition of notice does not impose a hardship upon the party required to give the notice, and is not therefore objectionable in itself; consequently the ruling of the court seems somewhat narrow. Even in insurance contracts, notice and the filing of proofs of loss may be made conditions precedent to recovery, compliance with which must be alleged and proved, irrespective of whether or not the company has been prejudiced by the failure. When the parties contract in clear and unambiguous language that no liability shall attach except under certain conditions, the surety, even though a paid one, is entitled to have the contract construed according to its terms. The parties may make the performance of certain conditions precedent necessary for recovery, and may make things immaterial the subject of their conditions.[4] When they do so their contracts are legal and binding and must be so construed. The court in the principal case seems to have ignored the right of the surety to stand on the unambiguous condition precedent of notice and to have based its decision on a rather severe application of the doctrine that a surety for profit is not "a favorite of the law". The more just rule, and the one which is followed by most courts, is that where the words of the contract admit of more than one interpretation, they should be construed against the surety company, but where the contract is clear and unambiguous, it should be enforced according to its terms.

A. H. C.

TENDER: NON-PRODUCTION OF THE MONEY.—There is language in the case of *Sheller v. Livingston*[1] which, if taken as the basis for future decisions, might lead to erroneous results. In an action of claim and delivery the issue was as to the sufficiency of a tender of storage charges. The debtor had offered to pay them, but had not produced the money, and this non-production was set up at the trial. The court says: "It appears, however, from the evidence that the offer was not accepted by defendant and no objection was made by him at the time that there was no actual production of the amount due as storage charges, nor does it appear that any demand was made that the money be produced.

---

[3] For collection of authorities see 33 L. R. A. (N. S.) 513. The Texas courts hold a contrary view, Lonergan v. San Antonio Loan & Trust Co. (1907), 101 Tex. 63, 104 S. W. 1061; American Surety Co. of N. Y. v. Koen (1908), 49 Tex. Civ. App. 98, 107 S. W. 938.

[4] United States Fidelity & Guaranty Co. v. Rice (1906), 148 Fed. 206, 78 C. C. A. 164; National Surety Co. v. Long (1903), 125 Fed. 887, 60 C. C. A. 623; Beech Grove Improvement Co. v. Title Guaranty & Surety Co. (1912), 50 Ind. App. 377, 98 N. E. 373; Knight & Jillson Co. v. Castle (1909), 172 Ind. 97, 87 N. E. 976.

[1] (Oct. 7, 1914), 19 Cal. App. Dec. 491.

Digitized by Google

In the absence of such objection the tender was a valid one." It is submitted that such language, seeming to imply that, had the non-production of the money been duly objected to, or the production demanded, the tender would have been insufficient unless the debtor had remedied the defect, does not properly state the California law on this point.

The common law rule was that, to make a tender valid. the money had to be produced when the offer of payment was made, whether the offer was accepted, or not.[2] But production was a mere formality, which was waived by failure to object to its non-production, at the time of the offer.[3] It was not an essential element of the transaction, as was the debtor's ability to pay.[4] Such was also the rule in California before the adoption of the Codes,[5] and there is at least one case since that time which uses language very similar to that in the principal case.[6]

But the Civil Code has changed all that.[7] It now does the creditor no good to object to the non-production of the money, and he gets no rights by demanding its production.[8] If, as in the case under consideration, he did not accept the offer, there is an end of it, and until he does accept, it is idle to talk of non-production, or of waiver of production. The rule having been changed there would seem to be no reason for retaining the phrasing of the former doctrine; and the use of such expressions as those quoted above can only be explained on the theory that the courts, in cases where the point has not come directly before them, have unconsciously lapsed into the language of the common law.

H. J. W.

TORT: FALSE IMPRISONMENT: LIABILITY OF JUSTICE UNDER COLORABLE JURISDICTION.—In the case of *Hayes v. Hutchinson & Shields*[1] a justice of the peace acting in compliance with the Washington code,[2] which purported to give him jurisdiction, issued a

---

[2] Bakeman v. Pooler (1836), 15 Wend. 637; Strong v. Blake (1865), 46 Barb. 227; Liebbrandt v. Myron Lodge No.1 (1871), 61 Ill. 81; Deering Harvester Co. v. Hamilton (1900), 80 Minn. 162, 83 N. W. 44; Erickson v. Thelin (1910), 26 S. D. 441, 128 N. W. 598.

[3] Bender v. Bean (1889), 52 Ark. 128, 12 S. W. 241; Ventres v. Cobb (1882), 105 Ill. 33; Germania Life Ins. Co. v. Potter (1908), 124 N. Y. App. Div. 814, 107 N. Y. Supp. 435.

[4] Breed v. Hurd (1828), 6 Pick. 356; Proebstel v. Trout (1911), 60 Ore. 145, 118 Pac. 551.

[5] Englander v. Rogers (1871), 41 Cal. 420.

[6] Green v. Barney (1894), 36 Pac. 1026, 4 Cal. Unrep. Cas. 665.

[7] Cal. Civ. Code, § 1496: "The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted." See also, Code Commissioners' note, Cal. Civ. Code Annotated, ed. 1874, § 1496.

[8] Peckham v. Stewart (1893), 97 Cal. 147, 31 Pac. 928; Latimer v. Capay Valley Land Co. (1902), 137 Cal. 286, 70 Pac. 82; Doak v. Bruson (1907), 152 Cal. 17, 91 Pac. 1001.

[1] (Sept. 4, 1914), 142 Pac. 865.

[2] Rem. & Bal. Code, §§ 749, 1790.

Digitized by Google

warrant for the arrest of an absconding debtor. Shortly thereafter, the code sections were declared unconstitutional, and the provisions of the state constitution[3] providing for the arrest of absconding debtors, were held to be executory and dependent on legislative action, other than the code provisions, which antedated the constitution.[4] The court held that where a justice of the peace had a colorable jurisdiction, and where no malice was alleged, an action for false imprisonment could not be maintained against him; the unconstitutional provisions of the code were held to give a colorable jurisdiction.

The question here raised depends upon an application of the principles of judicial immunity. There is a well recognized line of cases, which holds an inferior judge liable at his peril if he acts without jurisdiction,[5] on the ground that since his jurisdiction has been limited "he best observes the spirit of the law by solving all questions of doubt against his jurisdiction", and can escape liability without violating his duty, being subject to reversal in the appellate courts.[6] Equally well recognized and it is believed better reasoned decisions hold the opposite view,[7] and in accord with the principal case, that the reasons for exempting superior judges apply with equal force in the case of a justice of the peace. It is rightly said that "a magistrate could not be respected, or independent, if his motives for his official action, or his conclusions could be put in question at the instance of every disappointed suitor."[8]

It is of peculiar note that the arresting creditor in this case was held liable for false imprisonment. That this is the law is not disputed;[9] but to the layman, it can hardly help being somewhat incomprehensible, in view of the fact that the justice who is presumably versed in the law, is protected. As Chief Justice Abbott once said, "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."[10]

W. W. L., Jr.

---

[3] Wash. Const. art. i, § 17.

[4] Hamilton v. Pacific Drug Co. (March 17, 1914), 78 Wash. 689, 139 Pac. 642.

[5] Piper v. Pearson (1854), 68 Mass. 120, 61 Am. Dec. 438; Barker v. Stetson (1856), 73 Mass. 53, 66 Am. Dec. 457; De Courcey v Cox (1892), 94 Cal. 665, 30 Pac. 95; Cooley on Torts, 3rd ed., 809.

[6] Cooley on Torts, 3rd ed., 810, 811.

[7] Calhoun v. Tittle (1898), 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; Grove v. Van Duyn (1882), 44 N. J. L. 654, 43 Am. Rep. 412; Brooks v. Mangan (1891), 86 Mich. 576, 49 N. W. 633.

[8] Robertson v. Parker (1898), 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889.

[9] Strozzi v. Wines (1899), 24 Nev. 389, 55 Pac. 828.

[10] Montriou v. Jefferys (1825), 2 Car. & P. 113, 12 Eng. Com. Law Rep. 479.

Digitized by Google

UNLAWFUL DETAINER: ACTION ALLOWED THOUGH MORTGAGE SECURITY.—The court, in *Toplitz v. Standard Oil Company*,[1] held that the lessor could bring an action of unlawful detainer against a tenant for the non-payment of rent and thus secure his eviction from the demised premises without first resorting to a chattel mortgage given by the tenant to secure the payment of rent, the action not coming within section 726 of the California Code of Civil Procedure which provides that "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage." The purpose of this section is to prevent a multiplicity of suits and to compel the holder of a debt secured by mortgage to exhaust his security before recourse to the general assets of the debtor.[2] This section is a limitation upon the rights which usually pertain to property, and the restriction should not be carried beyond the obvious import of the language used.[3]

The principal case seems to decide a point heretofore undecided in this state. In Schehr v. Berkey,[4] the lessee gave a chattel mortgage to secure the payment of rent and damages. Later the lease was assigned by the lessee. It was held that the lessor did not lose the right to foreclose the mortgage by having resorted to an action of unlawful detainer against the assignee. The reason given for the decision was that the lessee was a surety for the assignee,[5] and that the former was bound by privity of contract, the latter by privity of estate. An action of claim and delivery may be brought without first resorting to foreclosure of the mortgage on the property replevied. The reason given is that the statute[6] gives a right to contract for possession and any other interpretation would nullify this statute and the intention of the parties.[7] The cases above cited recognize that the two actions

---

[1] (Oct. 7, 1914), 19 Cal. App. Dec. 493.

[2] Ould v. Stoddard (1880), 54 Cal. 613.

[3] Merced Bank v. Casaccia (1894), 103 Cal. 641, 37 Pac. 648. In the following cases it has been held that section 726 does not apply: Judgment and foreclosure on property in another state does not bar suit in this state, Felton v. West (1894), 102 Cal. 266, 36 Pac. 676; contra, where property is in state and note sued on in another state, Ould v. Stoddard (1880), 54 Cal. 613; does not refer to pledge, Savings Bank v. Middlekauff (1896), 113 Cal. 463, 45 Pac. 840; if note and mortgage securing same is assigned as collateral security it is not to secure principal debt and suit to foreclose same is for preservation of security and not for recovery of principal debt, McArthur v. Magee, (1896), 114 Cal. 126, 45 Pac. 1068.

[4] (1913), 166 Cal. 157, 135 Pac. 41.

[5] Carver v. Steele (1897), 116 Cal. 119, 47 Pac. 1007, 58 Am. Rep. 156, holding that a surety on a note may be sued although a right to recover on the mortgage is barred.

[6] Cal. Civ. Code, § 2927.

[7] Harper v. Gordon (1900), 128 Cal. 489, 61 Pac. 84; Ely v. Williams (1907), 6 Cal. App. 455, 92 Pac. 393. But see Cederholm v. Loffborrow (1886), 2 Idaho 176, 9 Pac. 641.

Digitized by Google

rest upon different rights, one, for the possession of property, the other, upon contract for the foreclosure of a mortgage.

Unlawful detainer is a summary proceeding for the possession of real property, in its nature a tort action. By taking the mortgage security it is not the intent of the lessor to waive the right to the summary remedy given by the code. If compelled to resort to the mortgage first, the lessor might be put to the necessity of retaining an undesirable tenant who would be piling up damages during the proceedings in excess of the security. Under these circumstances unlawful detainer is purely a possessory action and not an action for the recovery of a debt or right secured by mortgage. Any other interpretation would defeat the intention of the parties and derogate from the real purpose of the statute.

The code gives an award of damages and rent found due or three times the amount in the discretion of the court.[8] The award is in the nature of damages for a tort, yet it includes the rent which is the debt secured by mortgage. The effect is, therefore, that the lessor recovers the rental indebtedness from the general assets of the lessee without being compelled to resort first to the mortgage security. Satisfaction of the judgment in unlawful detainer would certainly be an extinguishment of any claim for rent due. It might be contended that in such a case the judgment in unlawful detainer should be for possession and damages leaving the recovery of the rent to an action to foreclose the security. Where damages are also secured by the mortgage perhaps the amount of damage should be assessed in unlawful detainer, leaving the recovery to an action to foreclose the mortgage. Where, however, as in Schehr v. Berkey,[9] the lease had been assigned, the court rendered a judgment including the rent against the assignee of the lease and then in another action foreclosed the mortgage against the lessee to satisfy the judgment.

C. R. S.

---

[8] Cal. Code Civ. Proc., § 1174.

[9] (1913), 166 Cal. 157, 135 Pac. 41.

Digitized by Google

Book Reviews

A TREATISE ON THE MODERN LAW OF EVIDENCE. By Charles Frederic Chamberlayne. Matthew Bender & Co., 511-513 Broadway, Albany, New York. 1913. Vol. 1, pp. cxxii, 1089; vol. 2, pp. xxviii, 2192; vol. 3, pp. xxxiii, 3470; vol. 4, pp. xxxv, 4956. $30.00.

The active practice of the author and his scholarly work as editor of Best and of Taylor brought the experience of a lifetime to bear on the preparation of this work. The book was not made in a day by writing out the head notes of cases on cards, shuffling the cards, and dealing out a text book. The author had worked out a scientific theory of the basic principles of the subject along the following lines. That the law of evidence consists of a few simple rules—the procedural side: that the cases are but applications of these rules and in the application free play must be given to judicial discretion; this is the administrative side. That the judicial and legislative error has been in making the administrative side consist of hard and fast rules of procedure resulting in decisions on technicalities and reversals for immaterial error. That the future of the law of evidence lies in the recognition of the fact that the essential rules are few and simple and their application must rest largely in sound discretion.

The greatest reformer in the English law of evidence was Bentham but he was not a lawyer and did not write law books. It has taken over a hundred years of ardent work by his followers to get his principles into the law. In recent years Thayer, whose treatise on practical evidence was never written, is exerting a wonderful influence in shaping the law of evidence along rational lines but chiefly through his students of whom Chamberlayne was one. Chamberlayne set himself the difficult task of expounding sound principles to the lawyers directly, but to do this it was necessary to write a book that lawyers would read. This has been in large part accomplished. The work is of encyclopedic comprehensiveness and fullness of citation. The classification of precedents under what may be termed the descriptive word method makes it easy to find the law and a case exactly in point. At the same time there is a terse summary of the precedents by a master of the theory and the case law.

Minute subdivision is pursued in the greatest detail, for example, in the character rule in criminal cases there is a separate discussion of the trait involved for eighteen different crimes. Again no text book has covered the subject of judicial notice so thoroughly. It may be questioned, however, whether the attempt to combine in one book the philosophy and the case law of the subject has been entirely successful. The repetitions due to the treatment of the subject under the two heads of procedure and

Digitized by Google

administration and the minuteness of detail spoil the work for continuous reading. On the other hand one using the book for ready reference on a particular topic either misses the broad principle exemplified by the topic or is bewildered by the unfamiliar classification and arrangement.

The task was performed under great difficulties; the eye-sight of the author failed almost entirely; the manuscript of the fourth volume was burned in the fire of the state house at Albany and had to be entirely re-written; the untimely death of the author has prevented the finishing touches from being added to the fourth volume, and has cut short the completion of the work by additional volumes on witnesses, the parol evidence rule, and other subjects usually included in treatises on evidence.

A. M. K.

THE DOCTRINE OF JUDICIAL REVIEW, ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS. By Edward S. Corwin. Princeton University Press, Princeton, New Jersey. 1914. pp. vii, 177. $1.50.

The leading essay in this little book, entitled "Marbury v. Madison and the Doctrine of Judicial Review", belongs with a number of other books and essays that have appeared within the last few years, dealing with the question of the power of the courts to declare legislative acts unconstitutional. The essay justifies and upholds, by a very careful examination of the case of Marbury v. Madison, the prevailing practices of the courts.

The essence of the writer's position is perhaps found in Hamilton's argument in No. 78 of the Federalist: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute."

The author's general attitude toward judicial review of legislative action is indicated by this passage: "The legislature acts simply upon considerations of expediency. The judges are controlled by precedent, logic, the sensible meaning of words, and their perception of moral consequences. Also, as it happens, our courts are today in a position in construing the constitution to avail themselves of the modern flexible view of law as something inherently developing, in a way never before possible to them. All constitutional limitations setting the bounds between the rights of the community and the rights of the individual have tended of recent years to be absorbed into the constitutional requirement of 'due process of law' and this requirement, in turn, has come to take on the general meaning of 'reasonable law'. So far as constitutional theory itself is concerned there is small ground for the

Digitized by Google

complaints levelled by reformers at judicial review. When, however, one turns to the more concrete matter of the fitness of particular judges for the great responsibility vested in them by the constitution, there is, of course, often room for discussion."

W. C. J.

THE MECHANICS OF LAW MAKING. By Courtenay Ilbert. Columbia University Press, 30-32 W. 27th St., New York. 1914. pp. viii, 209. $1.50.

This little book is a reprint of the Carpentier Lectures at Columbia University in 1913, with some prunings and some additions. The distinguished author, whose vast experience as parliamentary draftsman and clerk of the House of Commons, qualifies him better to speak upon this subject than perhaps any English speaking person, here discourses entertainingly, though learnedly, upon the theme which he has covered in a more technical way in his Legislative Methods and Forms. Particularly keen and provocative of thought are the author's remarks upon the causes of English indifference to codification, and upon the growing importance of administrative legislation.

Mr. Justice Holmes says: "When a man has a working knowledge of his business, he can spend his leisure better than in reading all the reported cases he has time for. They are apt to be only the small change of legal thought. It is worth while, even with the most mundane ideals, to get as big a grasp of one's subject as one can." There are books which deal with the larger aspects of the law and which are as interesting and attractive as most novels. Sir Courtenay Ilbert's modest contribution is one of those books.

O. K. M.

THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA. By Cardinal Goodwin. The Macmillan Co., 64-66 Fifth Ave., New York. 1914. pp. xiv, 359. $2.00.

This is a valuable work, a desired contribution to the study of California history. The core of the book, the main thesis, is thoroughly sound and reliable. It is a pity, therefore, that the introductory chapters, and some portions of the sequel, have no greater authenticity than their sources—the pity, of course, being that the author in these portions drew from second-hand sources. These portions, which we are in a measure disparaging, rely too largely upon Bancroft and Royce. Bancroft's work is so permeated with personal prejudice, antipathy, and resentment, as well as lacking in historical sense and perspective, as to be useless, if not misleading, as a guide and authority. It is a pity, then, that any one who assumes to undertake scholarly research work should place any dependence upon Bancroft's conclusions. And Royce, in a considerable portion of his "California" followed the lead of Bancroft, and is of course no more reliable than his

Digitized by Google

guide, although he clothed his story with a charm of language and imagination wholly his own. And when Royce treated of the Land Question in California, he was beyond his depth in unknown waters. Consequently the "Interregnum" of California history, the political and social characteristics of the period from the Conquest to the admission of the State into the Union, remains still to be written with discerning and judicious mind.

But the Constitutional Convention and the Organization of the State Government, covering pages 91 to 307 in the book under review, may be considered to have received definitive discussion. The book may be said to lack atmosphere, but it has such manifest merits of painstaking investigation and reliable judgment in this portion where the author has gone to the sources himself and has relied on no second-hand impressions that we welcome it with cordial praise. This central portion of the book, treating of the formation of the constitution, analyzes and classifies the work of the convention in seven chapters, dealing respectively with the Departments of Government, the Free Negro Question, the Eastern Boundary, Corporations and Banks, Education and Taxation, Completion of the Convention's Work, and Sources of the Constition. All of these questions are treated thoroughly and adequately. And the following chapters on Organization of the First Legislature, and on the question whether the Civil or Common Law should prevail in California are well handled.

The author has broken down at least one long-standing impression, namely, that a group of southern politicians dominated the Convention of 1849. He shows convincingly that the proposition to put the eastern boundary at the farthest point recognized by the treaty with Mexico, and including the Mormon settlement at Salt Lake, was not supported by southern men any more than by northern, and so was not prompted on grounds of slave extension. Likewise he shows that the exclusion of the free negro was a question in which the men from the northern states were interested as much as the men from the South. The settlement of differences of opinion in the boundary question was prompted by a desire to obtain immediate admission to statehood. The question of free negroes and other disturbing problems were solved on the principle thus stated by the author: "In their home states party affiliations and local institutions were given first consideration; in their new environment a common feeling of the necessity of union took precedence over all other interests."

W. C. J.

FOREIGNERS IN TURKEY, THEIR JURIDICAL STATUS. By Philip Marshall Brown. Princeton University Press, Princeton, New Jersey. 1914. pp. vii, 157. $1.25.

In this small volume the author has presented a very readable sketch of the origin and content of the immunities enjoyed by foreigners in Turkey as they existed before the present war began

Digitized by Google

and before the declaration by Turkey that she would no longer tolerate their existence. Professor Brown rejects the commonly accepted view that these immunities were due to the necessity of protection from the inequalities and rigors of Moslem law as applied to non-Moslems and sees their origin in an act of constructive statesmanship on the part of Mohammed the Conqueror. "The essential fact to be noted", he says, "is simply that the Turks in the midst of a great triumph spontaneously and generously recognized the right of the conquered to be governed by their own laws and customs in matters held sacred by the Moslems, as well as in matters not of vital concern to the state." This policy he regards as in harmony with the Moslem system of jurisprudence and with the generally recognized practice of the nations at that time.

The attempt in the last chapter to reconcile Turkey to the existence of the immunities enjoyed by foreigners through a reduction in their extent and their extension as thus reduced to other states has lost its force through the action of Turkey in declaring that they were no longer in force, but the idea seems too much in conflict with the whole theory upon which the modern nation has been developed to be of great practical value.

E. E.

Books Received

OUTLINES AND NOTES ON PRELIMINARY LAW EXAMINATION OF SUPREME COURT OF PENNSYLVANIA. Arranged and edited by John N. English. Student Law Book Co., Perrysville, Pa. 1913. pp. v, 124. $3.75.

THE LAW AS A VOCATION. By Frederick J. Allen. The Vocation Bureau of Boston, 6 Beacon St., Boston, Mass. 1913. pp. 100. $1.00.

CONCERNING JUSTICE. By Lucilius A. Emery. Yale University Press, 209 Elm St., New Haven, Conn. 1914. pp. 170. $1.35 net.

THE DEPARTMENT OF STATE. By Gaillard Hunt. Yale University Press, 209 Elm St., New Haven, Conn.

UNPOPULAR GOVERNMENT IN THE UNITED STATES. By Albert M. Kales. University of Chicago Press, 58th St. and Ellis Ave., Chicago, Ill. 1914. pp. 270. $1.50 net.

THE COURTS, THE CONSTITUTION, AND PARTIES. STUDIES IN CONSTITUTIONAL HISTORY AND POLITICS. By Andrew C. McLaughlin. University of Chicago Press, 58th St. and Ellis Ave., Chicago, Ill. 1912. pp. vi, 300. $1.50 net.

THE PEOPLE'S LAW. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 64. $.30.

MAN. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 54. $.30.

Digitized by Google

THE VALUE OF AN IDEAL. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 57. $.30.

THE PRICE OF A SOUL. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 72. $.30.

THE PRINCE OF PEACE. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 63. $.30.

JURISDICTION OF THE FEDERAL COURTS. By the late Amos M. Thayer. Revised and annotated by Byron F. Babbitt. The F. H. Thomas Law Book Co., 14 South Broadway, St. Louis, Mo. 1914. pp. xi, 268. $2.50.

TRIAL OF JOHN ALEXANDER DICKMAN. Edited by S. O. Rowan-Hamilton. William Hodge & Co., 12 Bank St., Edinburgh, Scotland. 1914. pp. viii, 208. 5s net.

TRIAL OF MARY BLANDY. Edited by William Roughead. William Hodge & Co., 12 Bank St., Edinburgh, Scotland. 1914. pp. iii, 210. 5s net.

TRIAL OF MADELEINE SMITH. Edited by A. Duncan Smith. William Hodge & Co., 12 Bank St., Edinburgh, Scotland. 1914. pp. xi, 371. 5s net.

BENDER'S WAR REVENUE LAW. The Emergency Revenue Act of 1914. Annotated. Matthew Bender & Co., 511-513 Broadway, Albany, New York. 1914. $2.00.

PRIZE COURT PRACTICE AND PROCEDURE. By R. J. Wickham Hurd. Effingham Wilson, 54 Threadneedle Street, London E. C., Eng. 1914. 1s 6d net.

JAPAN TO AMERICA. A Symposium of Papers by Political Leaders and Representative Citizens of Japan on Conditions in Japan and on the Relations Between Japan and the United States. Edited by Naoichi Masaoka. G. P. Putnam's Sons, 2, 4, and 6 W. 45th St., New York. 1914. pp. xii, 235. $1.25 net.

BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA. By John Bouvier. Third Revision (being the eighth edition) by Francis Rawle. West Publishing Co., 52-58 W. 3rd St., St. Paul, Minn. 1914. pp. xix, 3504. 3 vol. $19.50.

A TREATISE ON THE LAW OF CARRIERS. By Dewitt C. Moore. Matthew Bender & Co., 511-513 Broadway, Albany, New York. 1914. Vol. 1, pp. cclxxxii, 580; vol. 2, pp. ix, 1448; vol. 3, pp. vii, 2444. $19.50.

DIGEST OF WORKMEN'S COMPENSATION AND INSURANCE LAWS IN THE UNITED STATES. Compiled by F. Robertson Jones. Workmen's Compensation Publicity Bureau, 80 Maiden Lane, New York. Dec., 1914. pp. 40. $2.00 paper, $3.00 leatherette.

SCIENCE AND RELIGION. The Rational and the Super-Rational. By Cassius J. Keyser. Yale University Press, 209 Elm St., New Haven, Conn. 1914. pp. 75. $.75.

Digitized by Google

California Law Review

Volume III. MARCH, 1915 Number 3

An Experiment in Simplified Procedure. Proceedings Before the Industrial Accident Commission.

THE question of the reform of judicial procedure has been before the public for many years, but without much progress. In England, after years of agitation, the judicature act finally accomplished sweeping and beneficial changes, but in the United States in spite of the widespread adoption of the code system of pleading, and in spite of frequent legislative "tinkering", the situation is still unsatisfactory. While there is no organized movement for a radical change in methods of procedure, such as preceded the adoption of the Field Codes, there undoubtedly is a strong undercurrent of dissatisfaction with existing systems which must culminate before many years in a thorough-going revision of our judicial organization and, in this state, of the code of civil procedure.

Such revision probably will be for the most part along the line of the present English practice. It will not be necessary, however, to rely wholly upon the experience of the English courts, as we already have in this state a working system of simplified procedure which may serve to some extent at least as a model for such revision.

In the administration of the Workmen's Compensation, Insurance and Safety Act, the California Industrial Accident Commission has, for the past two years, been engaged with considerable success in developing an inexpensive, non-technical and expeditious system for the disposal of litigated cases coming before it. It is true that the procedure now in force has been

Digitized by Google

subjected to the strain of heavy litigation for less than a year. Since the taking effect of the Boynton Compulsory Compensation Act on January 1, 1914, the commission has tried and decided approximately five hundred cases, as against less than one hundred in the two years prior thereto under the elective provisions of the Roseberry Law. While it may not yet have reached its final shape, the procedure adopted has been sufficiently tested to warrant a brief description of the methods used and results obtained, with the possible conclusions to be drawn applicable to a revision of the code of civil procedure.

First, a few words as to the peculiar necessity, under the Workmen's Compensation Act, for a special tribunal and radically simplified procedure.

In enacting workmen's compensation laws throughout the United States, it would have been natural to entrust the duty of administering such acts to the civil courts. This was done in England, where workmen's compensation cases are tried in the county courts, with a right of review by the High Court of Justice. The almost unanimous practice in the United States has been to create administrative commissions to hear the litigation arising under such acts and to divest the courts of all powers therein, except a limited right of review upon questions of law. The reason undoubtedly lies in the inferior procedure of American courts, as compared with those of Great Britain, our procedure being cumbersome and expensive enough in the average contested case, and practically prohibitive of justice in the class of cases covered by workmen's compensation acts.

The primary purpose of these statutes is to provide means of support for the victims of industrial accidents at the time such support is needed. Instead of providing for the payment of a large sum of money at some later period, which sum will entirely compensate the injured man for his loss and suffering, he is cut down to sixty-five per cent of his average weekly wages, to be paid for his support until he is able to return to work. Both in the nature of the liability of the employer, and in the mode of payment to the injured employee, therefore, the benefits prescribed by the act are more nearly allied to compulsory accident insurance than to a right to recover damages for a tort. Such acts are, furthermore, designed for the protection of workingmen with an average earning capacity of one thousand dollars per year, the maximum and minimum limits of the California act

Digitized by Google

being one thousand and sixty-six dollars and sixty-six cents, and three hundred and thirty-three dollars and thirty-three cents, respectively. Employees belonging to this class rarely have sufficient money in reserve to tide them over, in the case of illness or accidental injury, more than the first two to four weeks of idleness before becoming a burden upon relatives, friends or public charities.

To effect the purpose of the act it is necessary that a tribunal be provided to decide cases arising under it with sufficient quickness and freedom from expense to secure the payments to the injured employee at the time that they are needed for support. This the civil courts are unable to do. In California our superior courts are competent eventually to decide a cause with entire justice and to award a sufficiently larger sum than that authorized by the act to compensate in full those surviving the litigation. They are incompetent, however, to secure the payment of the smaller amounts prescribed by the act at the time they are needed for his support or cheaply enough to permit an injured man claiming a doctor's bill of ten dollars, and one week's disability indemnity, to secure the amount given him by the law. Nor could our justices' courts, in spite of their greater flexibility of procedure, do much better, because of the complexity of the legal and medical issues raised in proceedings under the workmen's compensation statutes, requiring specialized training to administer them. To place the administration of this act in the hands of the justices' courts would necessitate such close supervision of their proceedings and frequent construction of the law by the higher courts, as would destroy any possible gain from the superior speed and inexpensiveness of their procedure.

The modifications made by the California Industrial Accident Commission in the rules of procedure heretofore in use, in the attempt to formulate a speedy and inexpensive procedure suitable to the needs of the class of litigants before it, are sweeping. The principal changes are as follows:

1. Fees and court costs are almost entirely eliminated. There are no filing or jury fees and the cost of reporting and transcribing the evidence is borne by the state. The only cost to the litigants is in the witness fees, which are the same as in court proceedings, and the charges of the attorney, where one is employed. In half of the cases before the commission the injured employee is unrepresented, and where an attorney is retained the average fee

Digitized by Google

allowed by the commission, where no briefs or memoranda of points and authorities are presented, is ten dollars.

2. The importance of pleadings is greatly minimized. Their function being merely to give notice of contested issues before trial.

The only pleadings allowed are the application and answer. Demurrers upon questions of form or substance, and motions to strike out, are abolished. Issues of law are raised orally at the trial, or by memoranda of points and authorities at any time, no decision being made upon them until the final decision of the cause. Trials are not delayed by the settlement of preliminary issues, and usually take place within fifteen days after the filing of the application.

Applications for compensation which omit material allegations are allowed to stand upon proof of such material allegations at the hearing, with or without amendment, and answers which fail to raise issues later found to be material in the decision of the case, are disregarded, evidence being allowed at the trial upon such defenses. In case of defects in the application or answer, however, the opposing party is always allowed further opportunity to introduce testimony if surprised, and costs will be imposed upon the party making the mistake if the opposing party has been put to unnecessary expense, as by the production of witnesses to prove issues not controverted at the hearing.

3. The procedure at the trial is also informal. The attitude of the commission upon rules of evidence will be discussed in a later paragraph. As to the remainder of the trial procedure, it should be noted that the purpose of the hearing is not to listen to such proof as may be presented by either side, but is to get at the facts, largely upon the initiative of the commission itself. The proceeding is looked upon in the nature of an investigation instead of a trial, and wherever the necessity for further testimony becomes apparent, the commissioner or referee conducting the hearing will arrange for the calling of the necessary witnesses, etc. The powers given the commission in this respect are very broad, section twenty-four (a) of the Workmen's Compensation, Insurance and Safety Act reading as follows:

> " . . . . but the commission may, *with or without notice to either party,* cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the time-books and pay roll of the employer to be examined by any commissioner or any referee appointed by the commission, and

Digitized by Google

> may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination to be reported to the commission for its consideration."

The principle referred to, that the hearing is an investigation and not a trial, determines the nature of the whole proceeding. The witnesses are examined chiefly by the commissioner or referee. After he has elicited all the information that appears to bear on the subject, the representatives of either side are allowed to ask such additional questions as may occur to them. The examination by either side, following the principal examination by the commissioner, is in the nature of a direct examination, for the purpose of eliciting whatever facts may have been overlooked, and not a cross-examination. While cross-examination is not prohibited, that kind of cross-examination which seeks to "re-hash" the whole of the testimony previously given without knowing in advance of any variations to be brought out, is not allowed.

The taking of testimony of medical and expert witnesses is also greatly simplified. The physicians who attended the injured man are of course called upon to give their story of what they found, and their opinion upon the nature of the injury. Expert testimony is rarely summoned by either party for the reason that the commissioner appoints its own medical experts. In case the medical testimony is conflicting, or the exact condition of the man is not established by impartial testimony, the injured man is sent to some specialist chosen by the medical director of the commission for his skill and experience upon the kind of disability in question. This referee is paid by the state and reports directly to the commission, copies of his report being sent to each side for their comments thereon. In consequence, the bringing of hosts of experts by each side, each expert having been found in advance to be favorable to the side producing and paying him, is entirely done away with.

No arguments are made at the hearing, although the privilege of stating contentions of law or fact is permitted. Written memoranda of points and authorities, or comments upon the evidence, are freely received provided the case will not be unduly delayed in waiting for them.

4. The principal gain is in the disregarding of rules of evidence at the hearing as far as questions of admissibility are concerned, obviating objections and arguments upon points of evidence and appeals upon errors in admission of evidence, and shortening materially the time consumed in trying cases. Another gain lies

Digitized by Google

in making the presentation of proof non-technical. Litigants do not, except in complicated cases, require the services of an attorney, thus avoiding a large part of the cost of litigation.

It must not be inferred, however, that the commission is endeavoring to dispense with the law of evidence viewed as a guide developed by years of experience as to what kinds of evidence are of value, and what kinds are to be distrusted. While questions of admissibility are ruled out for purposes of speed and inexpensiveness of trying issues, the evidence is always taken with the limitation that it is received only for what it is worth, and in rendering the decision is weighed in the light of the experience of the courts upon the value of such evidence. In this respect the practice of the commission is the same as the practice of many superior court judges when sitting without a jury in discouraging objections upon points of evidence where the testimony is in any degree relevant. In juvenile court and probation proceedings the same informality is usually adopted by the court, particularly as to the practice of the court to inform itself by hearsay and evidence of other misdeeds, etc.

The power of the Industrial Accident Commission to receive evidence which would not be admissible in formal proceedings in courts of law has been strongly questioned in a case recently decided by the commission, that of Marsters v. Hind, Rolph and Company and Employers' Liability Assurance Corporation, decided on September 25, 1914. Inasmuch as this case is now before the Supreme Court upon writ of review, only the contentions of the opposing sides will be quoted, without entering into a discussion thereon. In this case the husband of the applicant died from blood-poisoning, supposed to have been contracted from an abrasion or bruise received by him while working upon the ship where he was employed. The only evidence that the deceased did receive such abrasion while acting in the course of his employment, except for the corroborative testimony of persons noticing the swollen condition of his wrist shortly after the injury, and of the medical testimony showing the entire possibility of the abrasion having been received as claimed, consisted in the statements of the deceased made to a shipmate, to his wife, his superior officer and the attending physicians before his death. It was strongly contended by the defendants that evidence of his statements as to the cause of his injury, being inadmissible in the courts of law, could not legally be allowed to go into the record before the commission, and at any rate, could not be considered by the commission in

Digitized by Google

rendering its decision; that hearsay evidence is notoriously bad evidence and entitled to no weight whatever; that the provision of the Workmen's Compensation Act, authorizing the commission to dispense with the technical rules of evidence was intended to draw a distinction between rules of evidence which were technical, and rules of evidence which were substantial in their nature, the hearsay rule being in the latter class.

The decision of the commission, however, was to the effect that it was authorized by the law to receive such evidence, and to consider it for what it was worth under all the circumstances; that the different provisions of the Workmen's Compensation Act authorizing it (1) to dispose with technical rules of evidence, (2) to regulate and prescribe the nature and extent of the proofs and evidence, (3) to conduct investigations and take testimony with or without notice, and the sections providing that (4) informalities in proceedings should not invalidate any decision, and (5) making the findings and conclusions of the commission on questions of fact not subject to review by the courts, confer this authority. The commission goes on in its opinion to urge that this informality is also permitted by the fact that it is an administrative commission, and not a court, and by the necessity of informal procedure to carry out the purpose of the act. In regard to the inability to use such hearsay evidence for what it is worth, after its reception, the commission points out that the law of evidence is a system of arbitrary rules for excluding evidence which, as a class, is dangerous, from the consideration of an untrained jury which might be prejudiced thereby. That it is not necessary, however, to bind a court or other trained and experienced tribunal by arbitrary rules excluding all evidence of a given class regardless of the merits of particular testimony in a particular case.

The procedure of the courts of continental Europe is alluded to in this regard, where there is no law of evidence, the only guide being logical relevancy, and the evidence being weighed according to its weight as viewed in the light of human experience.

The decision of the Supreme Court upon this question is awaited with considerable interest, as the quickness and inexpensiveness of the procedure of the Industrial Accident Commission is involved to a considerable extent in the questions appealed.

5. The procedure of the Industrial Accident Commission is also interesting in the way in which it bears upon the services of attorneys. The amount of compensation allowed injured persons

Digitized by Google

is so closely limited by the act to actual need for support that large attorneys' fees would defeat its purpose. Remuneration is therefore slight, except in complicated cases. The elimination of arguments upon rules of evidence, and the elimination of technical steps in procedure, largely do away with the necessity of professional guidance except upon three points: preliminary advice as to the institution of a claim, advice as to necessary witnesses to be summoned and briefs upon difficult points of law, where they arise. And even here the services of an attorney are usually convenient rather than necessary, as the commission itself advises the litigants without expense, and actively supervises the presentation of proof.

No system of procedure can, however, be judged solely by a description of its different steps and rules. Its results also must be considered. To determine the value of any new system, inquiry should be made as to three points, (1) has the system where it has been tried reduced the time necessary to reach a final decision, (2) has it reduced the cost of litigation, (3) has it opened the way for any greater injustice or possibility of wrong decisions than now exists in the more formal systems of procedure? These tests will be applied in the order given to the trial of cases before the Industrial Accident Commission, as far as it is possible to draw any definite conclusions.

The actual time consumed in taking testimony before the commission in view of the elimination of objections upon points of evidence, etc., is short. In making an average of the time consumed in trying cases, it appears that less than two hours is taken per trial in receiving testimony. Occasionally a very hotly contested case may take from four to six hours, but this is more than balanced by the number of smaller cases in which one hour suffices to examine all of the witnesses.

In the other stages of a proceeding for compensation, the commission has also been successful in reducing the time taken up. An average of all of the cases decided in the first six months of the year 1914 shows that the period consumed from the filing of the application until the sending out of the decision is six weeks. An average of twenty cases decided during the months of October and November, 1914, shows that this has been somewhat increased, due to congestion of the calendar, but nevertheless the average for these twenty cases falls below seven weeks from start to finish. In discussing this average it should be remembered that, during the year 1914, something over seven hundred cases were

Digitized by Google

filed under the Boynton Act, and practically four hundred decisions made, in addition to some fifty decisions upon cases arising under the older Roseberry Act. When it is considered that the irreducible minimum for determining a claim, including the ten days statutory period required for notice, the time for transcribing the testimony and that necessarily consumed in rendering a decision after the case has been submitted, will take at least three weeks, and that the taking of additional testimony after the first hearing, which is frequently required, and the obtaining of reports from medical referees, takes two weeks longer at least, it will be seen that the commission has achieved extraordinary results. It is probable that when the facilities of the commission become adequate to handle the present rush of cases, the average time required to decide a case will be lowered to five weeks from the filing of the application to the adjustment of the controversy.

The reduction in expense of litigation before the commission has already been commented upon. There are no filing, stenographical or jury fees, except a charge of ten cents per page for copies of the testimony where a party desires a copy for his own use. Even this charge is not made where the party was not present or represented when the testimony was taken. The only cost to the litigant, therefore, is the statutory per diem of witnesses summoned by him, and the attorney's fee, averaging ten dollars, where one is employed. The imposition of such costs upon the adverse party as have been named is in the discretion of the commission.

The time and expense of appeals to the Supreme Court or District Courts of Appeal from the decisions of the commission is not included in the above comparison. It is sufficient to say that only one mode of appeal is allowed by the Workmen's Compensation, Insurance and Safety Act, i. e., by writ of certiorari or review, which is exceedingly direct and expeditious as compared with the usual course of appeals from judgments of the Superior Court. There is no stage of a proceeding before the commission, therefore, which is as lengthy or costly as the similar stage of a proceeding before the courts.

A procedure is not sufficient, however, which merely reduces cost and time of litigation. It is also necessary that the informality of the procedure adopted does not open the way to opportunity for a wrong decision. The great and perhaps only advantage of formality in court proceedings is that it prevents arbitrary and

Digitized by Google

hasty action. Indeed, technicalities and formalities have been at all times a defense against arbitrary and unjust decisions, as well as an obstacle to speedy and inexpensive relief. It is impossible, of course, to find statistics upon the proportion of cases wrongly decided, either by the commission or by any court. The causes that may lead to possible injustice may, however, be scrutinized to see whether the procedure used by the commission opens the door to any greater possibility of injustice from these causes than now exists in the superior courts. The different ways in which injustice is possible in litigation may be summarized as follows: (1) technicality of procedure, which may delay relief or make it unduly expensive, or create a bar which litigants with righteous claims are unable to surmount; (2) extreme informality of procedure, which may allow an opportunity for hasty and ill-considered rulings; (3) hasty, ignorant or corrupt action by the court; (4) perjury by witnesses or fraud by counsel or parties upon the opposing party.

To consider these four causes in more detail:

1. The possibility of injustice by reason of litigants with righteous causes being unable to surmount technical bars in procedure or production of evidence, is lessened in proceedings before the commission. The free introduction of evidence for what it is worth, which might not be admissible in the superior courts, often aids in preventing a denial of justice, as in cases where a fact at issue would be proved to the entire satisfaction of the average reasonable man, but could not be technically established in the courts by reason of the absence or death of necessary witnesses.

2. While informality of procedure gives a greater opportunity for arbitrary and hasty action of the judge, this danger is overcome in proceedings before the commission, by the requirement that a majority, if not all, of the commissioners must pass upon every case. The danger of a one-man point of view in making a decision is also less than in superior court proceedings. An additional safety factor in this respect lies in the practice of the commission to refer cases in any way doubtful to the members of its legal and medical staffs for opinions upon difficult issues. While the opinions submitted on request are not always followed, at least every angle of the question at issue is exhausted before a decision is made.

3. The same scrutiny by more than one trier of the facts also

Digitized by Google

diminishes whatever danger there might be in the course of years of ignorant or corrupt decisions, making it less than if the decision were to be rendered by one man only, as in the superior courts. On the other hand, the findings of fact of the commission are made by the act not subject to appeal on any ground, thereby conferring probably a somewhat greater immunity from appellate scrutiny than is accorded to findings of fact of a jury or of a judge sitting without a jury. Considering these two circumstances together, however, it at least cannot be said that the powers and procedure of the Industrial Accident Commission open the way to any greater possible injustice than now exists under the powers and procedure of the superior courts.

4. Not much can be said upon the subject of perjury. Possibly perjury can be detected the more easily in the superior courts, by reason of prolonged and usually fruitless cross-examination being more freely allowed. But on the other hand, certain kinds of perjury are more easily checked in proceedings before the commission. Testimony as to the nature or extent of the injury, or as to the present condition of disability of the injured man, is always checked by sending the man to medical referees appointed by the commission for thorough examination. With such examination at the expense of the commission, fraud and malingering can more easily be detected than by the production of expert witnesses by each side, each "expert" being ascertained in advance to be favorable to the side calling him as a witness, as is done in the courts.

What suggestions can be made as to the reform of procedure in the superior courts, as shown from the experience of the Industrial Accident Commission to date? Of course this question must be approached with great caution, both because of the fact that the litigation handled by the Industrial Accident Commission is highly specialized and of a different nature from that arising before the courts, and also because the simplified procedure used by the commission has not been tested for a long period of years. Any suggestion could be only tentative.

Doubtless no radical reform in the law of evidence or in the mode of conducting a trial can be brought about as long as the jury system is retained. There must be a preliminary purification of the evidence by the court by the use of a system of rules of evidence wherever a jury is used, and the country is not ready at the present time to consider the abolition of the jury system. Any

Digitized by Google

radical reform along this line should therefore be approached, not by abolishing the jury system or by sweeping away such technicalities of procedure as are necessary to safeguard it, but by the supplying of an optional or partially compulsory system to be used side by side with it, until the experience of some years under such optional, informal system shall indicate more clearly what further changes may safely be made. Such suggested system should, speaking generally, be along these lines:

First: Its use should be made compulsory in all actions where a jury is not a matter of right, as in equity and divorce actions. In proceedings at law, where a jury can be demanded by either side, as of right, it should be used only by the consent of both parties, both thereby waiving all technical or obstructive objections, and employing the simplified procedure according to its spirit and purpose.

Such consent could be made at any time and the case put immediately upon the calendar of informal procedure cases. Preferably, however, a request to have the case placed upon such calendar should be contained in or attached to the complaint in actions at law at the time of service and should be consented to by the defendant at the time of first appearance.

Second: A date for the hearing of the case should be set at the time of appearance or when the consent of the defendant is first obtained, and such hearing should be had within two weeks after service upon the defendant or consent to use this procedure. Only one postponement should be allowed, and that for not over two weeks, unless the parties request a continuance for the purpose of arranging a settlement.

Third: All demurrers, both for defects of form and substance, should be abolished, substituting instead merely an informal oral or written statement of contentions on points of law or fact at the taking of the testimony. The only pleading by the defendant should be a verified and detailed answer.

Fourth: At the first hearing the person trying the case should require the parties to stipulate as to all issues that they could agree upon, and outline the contested issues of fact or law. Costs should be imposed upon each party for issues contested by it without sufficient grounds for raising the issue.

Fifth: The hearing should be in the nature of an investigation before an examiner or court commissioner, in which the examiner takes the leading part in bringing out the necessary facts instead

Digitized by Google

of acting as umpire between the litigants. The examiner should have full power to call for additional evidence, appoint expert opinion witnesses, and make investigations upon his own motion if necessary, provided notice be given to the parties of his conclusions where no prior notice is given. In general, the responsibility for getting at the merits of the case should be upon the examiner equally with litigants. In cases not presenting complicated issues it should be possible for a litigant to dispense with the services of an attorney if he so desires, relying upon the guidance of the examiner in presenting his case.

One strong difference between the American and German systems of trial practice in this respect lies in the guidance given the litigants by the person trying the case. The American practice is for the judge to act as umpire, the responsibility for presenting the case properly and in preventing the other side from presenting its case, resting upon the attorneys. In Germany, on the other hand, the court exercises a much stronger control over the proceedings. In Berlin there are over eighty judges, as compared with twenty or thirty-five in a city of equal size in English-speaking countries. The German judges supervise the presentation of a case, making suggestions to either side, and endeavoring to gain the essential facts where the attorney has misconstrued the issues or failed to present them properly.

Sixth: The examiner should not be bound by rules of evidence to the extent that arguments upon the law of evidence would be in order before him, and no appeal upon errors in admitting evidence should be allowed. At the confirmation of the report, to be discussed below, the superior court should, of course, give such weight to evidence not admissible in more formal proceedings as the judges think advisable under all the circumstances. If relevant evidence is wrongly refused admission in the opinion of the superior court, arrangements should be made to add such testimony to the record. The intent of this procedure, as far as the law of evidence is concerned, should be to preserve the spirit of the rules of evidence as means of testing the weight of evidence, but to abolish all arguments or appeals upon questions of admissibility, to prevent delay in the proceedings.

Seventh: The examiner to transmit the record, with his findings of fact and findings of law stated separately, to the superior court, for confirmation upon both findings of law and fact. Such confirmation should be made preferably by two or more judges,

Digitized by Google

after informal oral or written argument upon the record by each side. If desired, an informal statement of contentions of law and fact could be placed in the record by the parties before the examiner prepares his findings, instead of being made to the court.

Eighth: The superior court to have power to set aside, modify or re-draft findings of fact or of law, to call for further testimony, either in the form of affidavits, depositions or re-submission to the examiner; to amend the pleadings upon its own motion to correspond with the issues developed at the trial; and in general to completely settle the controversy without trying the case over again.

Ninth: The findings of fact as confirmed by the superior court to be conclusive, and not subject to review, and appeal to be allowed only upon issues of law.

The change in our procedure herein outlined is not as great an innovation as might appear. In substance it is to a considerable extent similar to that used in courts of chancery before the amalgamation of legal and equitable proceedings. The procedure of our law courts was developed almost entirely out of the necessities of the jury system, its characteristic features being a preliminary settlement of the exact issues in controversy and a law of evidence by which the testimony can be purified by the court to prevent the jury being prejudiced. The characteristics of equitable procedure, which was not based upon the jury system, lay in the trial of cases upon sworn statements of the parties and depositions of witnesses, with an occasional reference to a master in chancery, subject to confirmation by the court, and in the absence of rules of pleading for settling issues and of a law of evidence. When the amalgamation of legal and equitable proceedings was brought about, the retention of the jury system unfortunately necessitated the application of legal principles of procedure to the combined form of action, rather than the application of equitable rules. The result has been far from satisfactory. In the interests of speedy and inexpensive determination of litigated cases, it is submitted that a return should be made in non-jury cases to a form of procedure based to a considerable extent upon the older equitable procedure. In considering such return a study should be made of the present English procedure, and in California, of a working model of what simplified procedure can accomplish on a small scale in the procedure of the Industrial Accident Commission.

San Francisco, California. *Warren H. Pillsbury.*

Digitized by Google

Chapters of the School Law of California
II. The School District.

NATURE *of the school district.*—The school district, in the language of the California Supreme Court, is a quasi municipal corporation, or a corporation of quasi municipal character.[1] The more common form of expression is to say that school districts are quasi corporations,[2] and of course of a public character. The term, whether quasi corporation or quasi municipal corporation, is intended to distinguish such corporations as school districts, road districts,[3] townships,[4] irrigation districts,[5] reclamation districts,[6] and counties,[7] on the one hand, from private corporations, and on the other hand from municipal corporations proper, such as cities and towns.

In an early California case Sawyer, C. J., thus distinguishes the several leading classes of corporations:

> "So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is

---

[1] Estate of Bulmer (1881), 59 Cal. 131; Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067; Kennedy v. Miller (1893), 97 Cal. 429, 32 Pac. 558; In re Wetmore (1893), 99 Cal. 146, 33 Pac. 769; Board of Education v. Board of Trustees (1900), 129 Cal. 599, 62 Pac. 173; Mitchell v. Board of Education (1902), 137 Cal. 372, 70 Pac. 180; Hancock v. Board of Education (1903), 140 Cal. 554, 74 Pac. 44; Los Angeles City School District v. Longden (1905), 148 Cal. 380, 83 Pac. 246; Pass School District v. Hollywood City School District (1909), 156 Cal. 416, 105 Pac. 122.

[2] A. H. Andrews Co. v. School District (1910), 95 Ark. 26, 128 S. W. 361; Freeland v. Stillman (1892), 49 Kan. 197, 30 Pac. 235; School District v. Thompson (1861), 5 Minn. 280; Harris v. School District (1853), 28 N. H. 58; State v. Troth (1871), 34 N. J. L. 377; Briegel v. City of Philadelphia (1890), 135 Pa. St. 451, 19 Atl. 1038; Montpelier Bank v. School District (1902), 115 Wis. 622, 92 N. W. 439.

[3] In County of San Bernardino v. S. P. R. R. Co. (1902), 137 Cal. 659, 70 Pac. 782, it was held that a road district is not a political entity; that it can neither sue nor be sued; that its affairs are entirely managed by the county officials; that its taxes are levied, collected, and expended by the county; and that its affairs are county affairs. It was in these particulars distinguished from a school district.

[4] Wilson v. Ulysses Township (1904), 72 Neb. 807, 101 N. W. 986.

[5] Fallbrook Irr. Dist. v. Abila (1895), 106 Cal. 355, 39 Pac. 794.

[6] Reclamation Dist. No. 70 v. Sherman (1909), 11 Cal. App. 399, 105 Pac. 277.

[7] People v. Sacramento County (1873), 45 Cal. 692.

Digitized by Google

> to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade, and the development of the general resources of the country. They derive nothing from the government, except the right to be a corporation, and to exercise the powers granted. In all other respects, to the extent of their powers, they stand upon the footing of natural persons, having such property as they may legally acquire, and holding and using it ultimately for the exclusive benefit of the stockholders. In this last class, the stockholders and those dealing with the corporation, are the only parties directly and immediately interested in their acts, so long as the corporation confines itself within the general scope of its powers. The rights of the corporation, the corporators, and of strangers dealing with the corporation, may, in some respects, vary according to the circumstances surrounding a given transaction."[8]

All corporations that are intended as agencies in the administration of the state government are public corporations as distinguished from private corporations. Thus cities, counties, and school districts are public corporations.[9] So are reclamation districts,[10] irrigation districts,[11] and sanitary districts,[12] all public corporations, in the sense of being invested with a certain degree of corporate power for the performance of their public functions. But all these corporate bodies are very distinct, from the point of view of legal rights and liabilities, from municipal corporations, which are the highest class of public corporations, and are invested with the largest powers, and subject to the most extensive liability. The distinction between these classes of public corporations is thus drawn by Judge Dillon:

> "The *school district or the road district* is usually invested by general enactments operating throughout the state with a

---

[8] Miners' Ditch Co. v. Zellerbach (1869), 37 Cal. 543, 577, 99 Am. Dec. 300.
[9] In re Werner (1900), 129 Cal. 567, 62 Pac. 97.
[10] Dean v. Davis (1876), 51 Cal. 406.
[11] Central Irr. Dist. v. De Lappe (1889), 79 Cal. 351, 21 Pac. 825.
[12] In re Werner (1900), 129 Cal. 567, 62 Pac. 97.

Digitized by Google

corporate character, the better to perform within and for the locality its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty. So with *counties.* They are involuntary political or civil divisions of the state, created by general laws to aid in the administration of government. Their powers are not uniform in all the states, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways,—all of which are matters of *state,* as distinguished from municipal concern. They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence; and hence have been frequently termed *quasi* corporations. This designation distinguishes them on the one hand from private corporations aggregate, and on the other from municipal corporations proper, such as cities or towns acting under charters, or incorporating statutes, and which are invested with more powers and endowed with special functions relating to the particular or local interests of the municipality, and to this end are granted a larger measure of corporate life."[18]

The limited nature of a school district may be seen from the wording of section 1575 of the Political Code: "Every school district must be designated by the name and style of '..... district (using the name of the district), of ..... county' (using the name of the county in which such district is situated); and in that name the trustees may sue and be sued, and hold and convey property for the use and benefit of such district. A number must not be used as a part of a designation of any school district." They are quasi corporations of the most limited powers known to the law. The trustees have special powers, set out in the statutes, and cannot exceed the limits. They are regarded as special agents without general power to represent the district. For some purposes the county supervisors represent the district, for others the county superintendent. It is provided that they may be sued, but that does not enlarge the scope of their powers. They are unlike municipal corporations, some of whose powers are con-

[18] 1 Dillon, Mun. Corp., 5th ed., § 37. See also the leading case of Hamilton County v. Mighels (1857), 7 Oh. St. 109; Skelly v. School Dist. (1894), 103 Cal. 652, 37 Pac. 643.

Digitized by Google

sidered private, as being for the special advantage of the municipality as distinguished from the general public. They cannot be sued by implication, without direct authority. In this they are like the state itself, and like counties, political subdivisions of the state, which may be sued only with the permission of the state. Their funds are all devoted by statute to specific purposes. They are not therefore subject to garnishment in behalf of a creditor.[14] And on the other hand, not being mentioned in section 1058 of the Code of Civil Procedure, which exempts the state, and counties and cities from the necessity of giving security in civil actions, school districts can claim no such exemption.[15]

Plenary power of the legislature over school districts.—Subject to constitutional limitations, the power of the legislature over school districts is plenary. It may divide, change, or abolish them, and provide for their government at pleasure.[16] The legislature has exercised its power and adopted an extensive school law extending from section 1543 to section 1892 of the Political Code, some of the sections expressly providing for school districts, and all assuming their existence. The school district is a corporation established for educational purposes.[17] It is implied, then, though nowhere expressly provided, that the school which a school district maintains shall be within the district.[18] For the purpose of establishing school districts is that schools may be brought conveniently near the pupils. This intent would be defeated if the trustees could maintain schools outside the district. The constitution declares that "the legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district."[19] Further, the Political Code gives the trustees power to manage school property *within* the district,[20] and requires every new district to open school therein within six months.[21]

A school district may be included within the same territory as a municipality, but is nevertheless a separate and distinct cor-

---

[14] Skelly v. School Dist. (1894), 103 Cal. 652, 37 Pac. 643.
[15] Mitchell v. Board of Education (1902), 137 Cal. 372, 70 Pac. 180.
[16] Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067; Bay View School Dist. v. Linscott (1893), 99 Cal. 25, 33 Pac. 781.
[17] Estate of Bulmer (1881), 59 Cal. 131.
[18] Bay View School Dist. v. Linscott (1893), 99 Cal. 25, 33 Pac. 781.
[19] Cal. Const., art. ix, § 5.
[20] Cal. Pol. Code, § 1858.
[21] Cal. Pol. Code, § 1617.

Digitized by Google

poration. "The legislative declaration,[22] that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name and embrace the same territory. The one derives its authority directly from the legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized."[23]

There are several interesting cases involving the authority of the legislature, or its agents, to change the boundaries of school districts, throwing, perhaps, the schoolhouse and other buildings which had belonged to one district into a new district. We shall review them briefly.

1. The electors of Fresno City School voted to raise $6000 for building a schoolhouse, but the trustees did not notify the county supervisors of the fact until September 23, 1890. On September 6, 1890, the supervisors changed the boundaries of the school district by excluding therefrom certain lands and transferring the same to other districts. On the first Monday in October, 1890, the trustees of the Fresno City School District levied a tax, for raising the $6000, on all the property that was within the district at the time the original vote was taken. The owners of the land excluded from the district by the action of the supervisors on September 6 sought to restrain the tax collector from collecting the tax so far as related to them. The court held,[24] that the power to change the boundaries of a district, as well as to define them in the first instance, was of legislative origin, and whether exercised immediately by the legislature or mediately by the board of supervisors—the local legislature—was, whenever exercised, a legislative act. In the exercise of its right, the legislature might make such provision respecting the property and obligations of the corporation of the school district as it might deem equitable or proper, and its action would be conclusive. This would be but carrying out the provisions of sections 1576 and 1577 of the Political Code. And under sections 1577 and 1830, it must be under-

[22] Cal. Pol. Code, § 1576.

[23] Kennedy v. Miller (1893), 97 Cal. 429, 32 Pac. 558. See also Mitchell v. Board of Education (1902), 137 Cal. 372, 70 Pac. 180.

[24] Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067.

Digitized by Google

stood that when the boundaries of a school district are changed either by forming a new corporation out of the territory of the original corporation or by transferring a portion of the territory to another corporation, in the absence of any provision of the law on the subject, the old corporation will be entitled to all the property and be solely liable for all the obligations, and the territory taken therefrom will not be entitled to any of the corporate property nor be liable for any of the obligations of the old corporation.[25] In order to render the territory which is transferred from one school district to another liable for any obligations incurred by that district, or to a contribution for any of its obligations, it would be necessary to show that such liability had been declared by the legislature.[26] The constitution,[27] while taking from the legislature the power to impose taxes upon counties or other public corporations, has not given such corporations directly the power to impose taxes themselves, but has authorized the legislature to vest such power in them by general laws. Consequently, the only power of a school district or other public corporation to impose a tax is such as is granted to it by the legislature by general laws.

The word "district"[28] is not the equivalent of "territory within the district", but is a synonym for "corporation"[29] voting the tax, and the tax to be levied by the supervisors is limited to the property within this corporation. From this it resulted that the "Fresno City School District" was the district that voted the tax, and it was only upon the property within the "Fresno City School District" that the tax could be levied. By a change in its boundaries the public corporation did not lose its identity or name, or cease to be the same legal entity it was before.[30] On principle, a tax on property which is outside the district to be benefited cannot be upheld.[31]

2. In 1865 there were in Santa Cruz County two adjacent school districts, one known as the Santa Cruz School District, and the other as the Bay View School District. From that time

---

[25] Authorities: Town of Depere v. Town of Bellevue (1872), 31 Wis. 120, 11 Am. Rep. 602; Laramie County v. Albany County (1875), 92 U. S. 307, 23 L. Ed. 552.

[26] Cal. Pol. Code, § 1817.

[27] Cal. Const., art. xi, § 12.

[28] Cal. Pol. Code, § 1837.

[29] Cal. Pol. Code, § 1575.

[30] Bates v. Gregory (1891), 89 Cal. 387, 26 Pac. 891.

[31] Authority: Richards v. Daggett (1808), 4 Mass. 534.

Digitized by Google

on each maintained its autonomy, electing trustees at proper times, and keeping school within its respective boundaries. In 1868 the Bay View district purchased a lot for its schoolhouse and expended $5000 in erecting the building. In every apportionment of money by the county superintendent until December 1, 1891, its share was regularly allotted. In 1866, the town of Santa Cruz was incorporated, and its exterior boundaries made to include a portion of the Bay View district, embracing the lot on which the Bay View trustees subsequently erected the schoolhouse and where the school was maintained. In 1876 the City of Santa Cruz was incorporated with the same boundaries as the town formerly had. After December 15, 1891, the county superintendent refused to make an apportionment of school moneys to the Bay View district.

It was held[32] that, under section 1576 of the Political Code, there could be no doubt that the City of Santa Cruz constituted a school district, nothing having been done to annex any territory to the city for school purposes.[33] And after the incorporation of the city the county board of supervisors ceased to have any power over the schools within the city.[34] The only grounds upon which the Bay View district could claim to have any rights were that the purchase of the lot, the erection of the schoolhouse and the maintenance of the school by the Bay View district, the apportionment of moneys by the county superintendent, and the acquiescence by the City of Santa Cruz, constituted an estoppel. To this contention it was held by the court that an act of the legislature fixing the boundaries of one of the political subdivisions of the state cannot be repealed by the officers of such subdivisions even by acts of estoppel. And the principle, already mentioned, was relied on, that the only schools which a district could maintain were those that were situated within its territorial boundaries.

3. In 1876 the Vernon School District bought certain land for school purposes. In 1896 the city of Los Angeles, under the provisions of the Annexation Act of 1889,[35] annexed certain territory which included that portion of Vernon School District which the district had purchased in 1876. The annexation proceedings were attacked on the ground that the act of 1889 was

---

[32] Bay View School Dist. v. Linscott (1893), 99 Cal. 25, 33 Pac. 781.
[33] Cal. Pol. Code, § 1576.
[34] Ibid.
[35] 1889 Stats. Cal. 358.

Digitized by Google

unconstitutional for two reasons, (1) because it conferred upon the electors of the municipality a special privilege not conferred upon the electors of the territory annexed; and (2) if the effect of the annexation was to make the board of education of the city successors in office of the Vernon School District, such purpose was not expressed in the title of the act.

It was held,[86] as to the first point, that the act was constitutional, for while the initiative in the annexation proceedings pertained solely to the municipality, the residents of the outside territory sought to be annexed were protected by the provision, which required the affirmative action of a majority of the voters thereof to authorize the annexation. As to the second point, it was held that the title of the act was broad enough to include a provision that the "annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation." It resulted, therefore, that the annexation was regular, complete and constitutional, and that part of the Vernon district, including the property acquired for school purposes, was henceforth within the municipality of Los Angeles, and the jurisdiction over it in school matters was transferred from the Vernon trustees to the Los Angeles board of education.[87]

4. In the next case,[88] we find that prior to 1870 there was a school district adjacent to the City of Stockton, known as North School District. By the act of reincorporation of the City of Stockton in 1870 a portion of the North district became a part of the municipality. In 1897 a majority of the heads of the families in the portion of the North district outside of the city limits petitioned to be annexed to the city for school purposes only, and in accordance therewith the county board of supervisors duly adopted an order annexing, for school purposes only, all the remainder of the North School district which had not been added to the city of Stockton by the re-incorporation in 1870. The proceedings were all avowedly in accordance with section 1576 of the Political Code. In October 1898, a resident of the portion of

[86] Vernon School District v. Board of Education (1899), 125 Cal. 593, 58 Pac. 175.
[87] Cal. Pol. Code, § 1576.
[88] Kramm v. Bogue (1899), 127 Cal. 122, 59 Pac. 394.

Digitized by Google

the North district, which had been annexed in 1897, applied to have his son admitted to the schools of Stockton. The petition was refused on the ground that the petitioner and his son did not reside within the limits of the city of Stockton. The main reliance of the Stockton school authorities was that section 1576 did not in terms apply to cities already incorporated. But the court held that such a construction was too narrow, that the section in question was to be liberally construed,[39] and that territory might be added, for school purposes, to a city already incorporated, as well as to a new municipal corporation. North School District had, consequently, disappeared, and its territory had come under the jurisdiction of the Stockton board of education, and petitioner and his son were of course residents of the Stockton school district.

5. In the fifth case[40] which we mention, the Pass School District had been for many years a school district of Los Angeles County. In 1889 certain real property was deeded to it for school purposes. In November, 1903, Hollywood City was incorporated, and Hollywood City School District came into existence. The property bought in 1889 fell within the corporate limits of the Hollywood City district. Adopting the language of the court: "The question presented may be thus stated: What, under the indicated circumstances, is the disposition made by the law of the real property of such corporation owned and used for the corporate purposes when, by a change in the boundaries, that property falls within the territorial limits of a new corporation organized for identical purposes? Or, wording it differently, did the title, dominion, power, and control over the land in controversy pass to the Hollywood City School District, or did they remain where formerly they had been, with the Pass School District?" It was held that this question had been conclusively answered by previous decisions of the court.[41] "By the legal annexation of the land in controversy to the city of Hollywood and the Hollywood City School District, (which latter, by virtue of section 1576 of the Political Code, sprang at the same time into existence), the power of the Pass School District to use this property for school

[39] Cal. Civ. Code, § 4.

[40] Pass School Dist. v. Hollywood City School Dist. (1909), 156 Cal. 416, 105 Pac. 122.

[41] Los Angeles County v. Orange County (1893), 97 Cal. 329, 32 Pac. 316; Johnson v. San Diego (1895), 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; Vernon School District v. Board of Education (1899), 125 Cal. 593, 58 Pac. 175.

Digitized by Google

purposes undoubtedly came to an end. For, by section 1617 of the Political Code, the management and control of school property within their district is vested in the trustees of the district. This proposition, as we understand it, appellant does not dispute. But it contends that *title* to this property still remained in the plaintiff district, with the correlative rights of leasing or selling the same." The court answered this contention in the following words: "The legislative power being full and complete over the matter, as a part of that power it may make provision for the division of the property and the apportionment of the debts of the old corporation, when a portion of its territory and public property are transferred to the jurisdiction of another corporation. But in the absence of such provision, the rule of the common law obtains, and that rule leaves the property where it is found, and the debt upon the original debtor."[42] The position taken by the court has abundant sanction in decisions of the California Supreme Court, the Supreme Court of the United States, and the courts of many other jurisdictions.[43]

To meet the argument, in this and the other cases which have been reviewed above, that an injustice would be done to the school district which had bought property and erected schoolhouses only to have them taken away and given to another district, the court said:

> "The state is profoundly interested in the education of its young, but has no deep concern over the personality of the trustees who shall administer this trust, so long as the administration is in the orderly form of law. But to relieve against the possibility of injustice being worked by the operation of the rule which might, without recompense, take a schoolhouse away from one district and assign it to another,

---

[42] Johnson v. San Diego (1895), 109 Cal. 468 at p. 477, 42 Pac. 249, 30 L. R. A. 178; Board of School Directors v. Ashland (1894), 87 Wis. 533, 58 N. W. 377.

[43] Vernon School Dist. v. Board of Education (1899), 125 Cal. 593, 58 Pac. 175; Bay View School Dist. v. Linscott (1893), 99 Cal. 25, 33 Pac. 781; Laramie County v. Albany County (1875), 92 U. S. 307, 23 L. Ed. 552; Mount Pleasant v. Beckwith (1879), 100 U. S. 514, 25 L. Ed. 699; McGovern v. Fairchild (1891), 2 Wash. St. 479, 27 Pac. 173; School Township of Allen v. School Town of Macy (1887), 109 Ind. 559, 10 N. E. 578; New Point, etc., v. School Town of New Point (1894), 138 Ind. 141, 37 N. E. 650; Prescott v. Town of Lennox (1898), 100 Tenn. 591, 47 S. W. 181; Bloomfield v. Glen Ridge (1896), 54 N. J. Eq. 276, 33 Atl. 925; Board of Education v. Board of Education (1887), 30 W. Va. 424, 4 S. E. 640; 1 Dillon, Mun. Corp., 5th ed., § 35; City of Wellington v. Wellington Township (1891), 46 Kan. 213, 26 Pac. 415.

Digitized by Google

this state has made explicit provision whereby the use of the school under the changed conditions may still be open to the children within the territory to which it originally belonged. This provision is found in section 1576 of the Political Code. But the residents within the plaintiff district have not seen fit to avail themselves of it. We are unable to perceive, therefore, that the rule adopted in this state either works injustice to plaintiff or does violence to any of its constitutional rights."

Dedications and bequests to school districts.—In two cases the limited capacity of the school district was strongly contended for, and the attempt was made to show that a school district could not receive a dedication of property nor be the object of testamentary disposition. In the former case,[44] which was an action to quiet title, the defendant claimed that trustees of the district could not accept a dedication of land without being authorized by a previous vote of the district. This claim was made under an act of April 6, 1863,[45] which provided that the board of trustees should "have power, when directed by vote of their district, to purchase, receive, hold, and convey real or personal property for school purposes." It was held, however, that this section has no application to a *dedication* of land. A dedication of land for a public or charitable use is good even without a donee to take it; and the legislature as well as chancery may appoint trustees who may maintain actions in regard to the land.[46] Furthermore, it is not essential to a dedication that the legal title should pass from the owner; nor that there should be any grantee of the use or easement *in esse* to take the fee, such cases being exceptions to the general rule requiring a grantee; nor is a deed or writing necessary to constitute a valid dedication; it may be by parol; and no specific length of possession is necessary to constitute a valid dedication.[47] On these grounds the dedication of the land in question to the school district was held valid and indefeasible.

In the second case,[48] the deceased had willed the residue of his estate to "Laurel School District". It was found that Laurel School District was a duly organized public school district under the laws of the state, that as such it was a corporation,[49] for educa-

[44] Carpenteria School Dist. v. Heath (1880), 56 Cal. 478.
[45] Hittell's Gen. Laws, art. 6692.
[46] See Dillon, Mun. Corp., 5th ed., § 1086.
[47] Authority: New Orleans v. U. S. (1836), 35 U. S. (10 Pet.) 662, 712, 9 L. Ed. 573.
[48] Estate of Bulmer (1881), 59 Cal. 131.
[49] Cal. Pol. Code, §§ 1575 ff.

Digitized by Google

tional purposes, and could, therefore, take by will.[50] Section 1275 of the Civil Code, which by implication gives this power to a school district reads:

> "A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, cannot take under a will, unless expressly authorized by statute; subject, however, to the provisions of section thirteen hundred and thirteen."

De facto school districts.—School districts may exist *de facto* as well as *de jure,* and all the protection and presumptions that prevail in the case of *de facto* officers will be recognized in the case of *de facto* school districts. An interesting case,[51] involving these principles, was decided by the Supreme Court in 1895. Coronado Beach had for several years been the subject of dispute whether it was within or without the territorial limits of the city of San Diego. The district court had in 1877 held that it was not part of the city, but judgment was not entered for eleven years. The case was then, in 1888, appealed, and the supreme court reversed the decision of the district court, and held that Coronado Beach was within the limits of the city of San Diego.[52] In January 1887, while the peninsula was regarded, under the decision of the district court, as outside the limits of the city, the county board of supervisors took formal steps to organize Coronado Beach into the "Coronado Beach School District of San Diego county". During the next four years this district exercised the powers and discharged the duties of a school district organized under the laws of California. It had its own board of trustees. It received and expended state and county school moneys, employed teachers, and maintained public schools. Forty thousand dollars in bonds were voted, the bonds sold, and the proceeds expended in the purchase of land and the erection of a schoolhouse. The plaintiff in the case had paid taxes in 1888 and 1889, and sued to recover back the taxes thus paid on the ground that there was no such school district in legal existence as that of Coronado Beach.

The Supreme Court laid down the following principles: 1. A school district is a corporation organized for educational pur-

---

[50] Cal. Civ. Code, § 1275.
[51] Hamilton v. County of San Diego (1895), 108 Cal. 273, 41 Pac. 305.
[52] San Diego v. Granniss (1888), 77 Cal. 511, 19 Pac. 875.

Digitized by Google

poses,[53] and as the law stood in 1887, "each county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district."[54] 2. The district had a *de facto* existence. There was nothing lacking to give the color of legality to its organization, or to render it impolitic to allow the collateral impeachment of such existence. 3. The same rule which recognizes officers *de facto* applies to corporations *de facto*. 4. The order of the board of supervisors purporting to create the district was the formal exercise of legislative power;[55] and thereunder everything having been done to constitute the district a corporation colorably, if not legally, the law will refuse, in an incidental and collateral way, to declare its proceedings void. 5. Although a part of the district composed of the city of San Diego, yet it was legally capable of segregation as an independent district.[56] 6. The board of supervisors of the county was a body having power under the law to organize new school districts in the county, and the order of the board of supervisors was within the lines of the statute,[57] and valid on its face, and only invalid because of the fact, then unknown, that the territory in question was within the limits of an incorporated city. 7. The order purported to form and establish into a school district the territory in question, with a designated name, in formal compliance with the statute.[58] 8. The district when organized exercised the powers and discharged the duties of a legally organized school district. 9. This was done to the exclusion of other districts; that is, no other district maintained a school or performed other office of such a corporation within its confines. 10. There was acquiescence not merely by the San Diego (city) school district but by the state and county in the assumption of such prerogatives by the new district. 11. The plaintiff, and those he represents, recognized the corporate existence of the district by paying taxes for its use. 12. Taxpayers cannot recover back taxes paid by them to a *de facto* school district for its bond and interest fund.

Another case,[59] presented the following facts: The Santa Barbara City School District in 1891, organized a high school under

---

[53] Authority: Estate of Bulmer (1881), 59 Cal. 131.
[54] Cal. Pol. Code, § 1576.
[55] Hughes v. Ewing (1892), 93 Cal. 414, 28 Pac. 1067.
[56] Cal. Pol. Code, § 1576.
[57] Cal. Pol. Code, §§ 1577-79.
[58] Cal. Pol. Code, §§ 1575, 1577.
[59] Hancock v. Board of Education (1903), 140 Cal. 554, 74 Pac. 44.

Digitized by Google

the High School Act of 1891 and continuously maintained said high school to January, 1900. The High School Act of 1891 was declared unconstitutional in McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836. That act was repealed in 1893 and instead thereof a new law was passed,[60] providing for the establishment and management of high schools. A new municipal charter for Santa Barbara was duly adopted and went into effect in January, 1900.[61] This charter provided for a board of education, directing that it should succeed to all the rights, property and obligations of the school trustees of the former school district, and that it should have power to establish and maintain high schools. In August, 1899, the school trustees had made a contract with the plaintiff, engaging him to act as principal of the high school from September 4, 1899, for one school year of ten months. Upon coming into office in January, 1900, the new board of education refused to allow plaintiff to act longer as principal of the high school according to the contract with their predecessors. The theory of the plaintiff was that the board of trustees of the city of Santa Barbara, upon their coming into office under the charter of that city, adopted in 1899, succeeded to all the rights and obligations, previously existing, of the high school district, and were obliged to carry out the contract which the plaintiff had made with that district. The principal theory of the defendant was that the so-called high school district, which, by its board, was alleged to have made the contract, had no existence, either in law or in fact, sufficient to enable it to make the contract, and that therefore it could not be said that there was a contract or obligation which the defendant could have assumed, and hence there could be no recovery. These contentions presented the question, whether the invalidity of the act of 1891, as decided in the case of McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836, under which the Santa Barbara high school was organized, and the failure of the district to reorganize under the subsequently amended law, rendered the alleged high school district non-existent so as to be unable to make valid contracts.

It was held by the court, speaking through Mr. Justice Shaw, that though the law under which a school district votes to establish, and does organize a high school, is unconstitutional, and is afterwards repealed by a law which authorizes it to organize a high school, and provides that its board of school trustees shall con-

[60] Cal. Pol. Code, § 1670.
[61] 1899 Stats. Cal. 486, § 172.

Digitized by Google

stitute the high school board, and manage and control the high school, and though there is no attempt to organize under the latter law, yet the acts of the trustees, as a high school board, in managing the high school, after passage of the latter act, claimed by them to be authorized, are under color of law, and cannot be collaterally attacked, so that a board of education, which succeeds to their rights and obligations, receiving money raised by taxes for the high school, is liable for breach of its contract employing a high school teacher.

It was further held that the existence of the legal character of a school district, formed under the state law, embracing a city and outlying territory, is not affected by the adoption of a charter for the city putting the school department under the government of a new board; and that section 1575 of the Political Code, providing that the trustees of every school district may sue and be sued, applies to city boards of education, as well as boards of country school districts.

School taxes.—The constitution[62] provides: "The proceeds of all lands . . . shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and *such other means* as the legislature may provide, shall be inviolably appropriated to the support of common schools throughout the state." An act of 1863[63] authorized Placer County to subscribe to the capital stock of the Central Pacific Railroad Company and provided that all money that should be paid to Placer County by said company should be placed in the "Railroad Fund". The question arose whether this act included properly and legally *all* taxes paid by the railroad company, even taxes paid by the railroad under a tax levied by the supervisors for the support of the common schools. It was held[64] that under the constitutional provision whenever the legislature raises a fund, by taxation or otherwise, for the support of common schools, it cannot, by contemporaneous or subsequent legislation, divert the fund to a different purpose.[65]

The school district itself is the competent party to recover

---

[62] Cal. Const. 1849, art. ix, § 2; Cal. Const. 1879, art. ix, § 4. This section was copied from § 2 of art. x of the original Constitution of Iowa.

[63] 1863 Stats. Cal. 145.

[64] Crosby v. Lyon (1869), 37 Cal. 242.

[65] Authority: District Township of Dubuque v. County Judge of Dubuque County (1862), 13 Iowa 250.

Digitized by Google

delinquent taxes. For while the law provides[66] that all taxes upon township, road, school or local districts shall be collected in the same manner as county taxes, this does not authorize a suit in the name of the county.

> "To say that such taxes [on railroad property imposed upon townships, road, school or other local districts] shall be collected in the same manner as county taxes are to be collected, is not the equivalent of a permission to sue for them in the name of the county, and, if it were, the county does not, and cannot, collect such taxes by suit in its own name."[67]

Where a school district is composed of the territory lying within the municipal limits and also other territory adjoining outside the city it is competent for the city authorities, council or board of trustees, to levy a tax for school purposes on all the property of the district. This is held to be expressly provided for in sections 1576 and 1670 of the Political Code, and these sections, in giving this power, are held to be constitutional.[68]

Where a special school tax has been assessed upon improvements described as a dam situated on a tract of land within the school district the dam being in fact outside of the district, but the lake thereby formed being partly within the district on the tract described, such tax, after voluntary payment thereof by the owner, cannot be recovered back by him, on the alleged ground of a mistake of fact on his part as to the location of the property assessed.[69] And district school taxes, as well as state and county taxes, are included in section 3817 of the Political Code, as amended in 1895;[70] which authorizes redemption of real estate, sold to the state for delinquent taxes, by payment of the amount due thereon at the time of the sale together with penalties based thereon. Therefore, one cannot escape the payment of the penalties in redeeming land sold for delinquent school taxes any more than for other taxes.[71]

It has been the aim, always thwarted, of school superintendents to devise some method whereby the necessity of going outside the school authorities in the levying of school taxes might be avoided. An act of 1863 in reference to the government of the common

---

[66] Cal. Pol. Code, § 3671.

[67] San Bernardino County v. S. P. R. R. Co. (1902), 137 Cal. 659, 70 Pac. 782.

[68] Visalia Savings Bank v. Visalia (1908), 153 Cal. 206, 94 Pac. 888.

[69] San Diego, etc. Co. v. La Presa School Dist. (1898), 122 Cal. 98, 54 Pac. 528.

[70] 1895 Stats. Cal. 333, c. 218.

[71] Palomares Land Co. v. Los Angeles County (1905), 146 Cal. 530, 80 Pac. 931.

Digitized by Google

schools in Sacramento, provided that the board of education should advise the city board of trustees as to the amount of money necessary to be raised by local taxation for the support of the schools for the ensuing year, and that the board of trustees should levy a school tax "which will produce a sum that will make the amount required by the board of education", provided such tax shall not exceed 35 cents on the $100. The amount called for by the board of education in 1892 required a tax of 35 cents. The board of trustees levied a tax of 26 cents.

In an action by the board of education against the board of trustees, to require them to levy a tax of 35 cents on the $100, the Supreme Court held[72] that the fair and reasonable interpretation to be given to the statute is, that the board of education shall give to the board of trustees an estimate in detail of the amount of money which in its judgment will be needed for disbursement in behalf of certain school purposes, and that the board of trustees, upon consideration thereof, shall exercise its own judgment in determining whether the purposes therein specified are suitable objects of expenditure, and whether the amount of money named in the statement is correctly estimated, and that thereupon it shall levy such taxes as in its judgment, having regard to the interests of the entire municipality as well as of its several parts, will be proper and just. The rule under which the court so held was that in the construction of statutes relating to the performance of a public duty which does not affect any private rights or interests, but concerns the public alone, the language of the statute, although imperative in terms, must be regarded as directory rather than mandatory.

The High School Act of March 20, 1891,[73] the first of the acts upon which the present system of high schools in California rests, contained the following provision:

> "An annual tax shall be levied by the authorities whose duty it is to levy taxes in counties, cities, incorporated towns, the amount of said tax being estimated by the County Superintendent of Schools, . . . and by him certified to the proper authorities on or before the second Monday of September of each year. And it shall be the duty of such authorities to levy such a rate as will produce the amount estimated to be necessary for such purposes."

---

[72] Board of Education v. Board of Trustees (1892), 96 Cal. 42, 30 Pac. 838.

[73] 1891 Stats. Cal. 182.

Digitized by Google

This was a repetition of the attempt which had been made in the Sacramento Act of 1863, and which had been nullified by the Supreme Court. In the case in which the question was anew presented for decision,[74] the court took a different line of argument and held the act unconstitutional. The court argued as follows:

> " . . . . since the power to levy a tax is purely legislative, it would seem to follow, that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events, it could not vest such power in an executive officer of such corporation . . . . when the estimate reaches the board of supervisors of the county which the act, in a way, recognizes as the proper authority to levy the tax, it has nothing to do but make a mathematical calculation, which consists in dividing the amount of the estimate by the amount of the taxable property in the district, and to enter the order. This is not the exercise of power. It is obedience to a command. Where one is required to do a given act in a mode prescribed, without reference to his judgment or discretion, except as to the mode of complying, the act is purely ministerial."

It was accordingly held that if the legislature cannot impose a tax upon the property or inhabitants of a school district, it would seem to follow that it cannot prescribe a procedure through which such tax would inevitably be levied without leaving some discretion in regard to it to the local authorities. That was what the provision of the act of March 20, 1891, in question did, in the opinion of the court, and was therefore in conflict with section 12 of article XI of the constitution. If the court had followed the decision in volume 96 of the California Reports, it could have upheld the statute and reached the same practical result.

In concluding this section of the present chapter, it may be noted that the Supreme Court upheld the revision of the High School Act as amended in 1895,[75] which provided that the high school should furnish to the authorities whose duty it is to levy taxes "an estimate of the amount of money required for conducting the school for the school year", and that said authorities should levy a tax "sufficient in amount to maintain the high school". The court held that this language cured the defects noted in McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836, because it left discretion in

---

[74] McCabe v. Carpenter (1894), 102 Cal. 469, 36 Pac. 836.
[75] Cal. Pol. Code, § 1670.

Digitized by Google

the appropriate taxing body to determine what amount would be sufficient for the purpose.[76]

It may be remarked that in one of these cases,[77] the court labored too arduously to explain the meaning of the simple, compendious expression, "the authorities whose duty it is to levy taxes in said city, incorporated town, school district, or union high school district". This phrase obviated the necessity of an enumeration to fit each case and was not the proper occasion for the following remark, in some connections suitable enough: "We have found it difficult to harmonize all the different clauses relating to the school system so as to give effect to the whole, and were we inclined to cavil, abundant cause might be found therefor in some of our school legislation."

School bonds.—In an action involving the refusal of a county auditor to sign and attest certain bonds, it was held that there being no specific requirement of the law declaring that bonds of a school district shall be made payable in money of a particular form or kind, a resolution of the trustees of the district, calling an election to determine whether the bonds shall be issued, is sufficient, when it provides for bonds payable in lawful money of the United States, and supports a subsequent order of the board of supervisors directing the issuance of the bonds and making them payable in gold coin of the United States. And, likewise, it is competent for the board of supervisors, after an election authorizing the issuance of school bonds, to determine whether the interest thereon should be paid annually or semi-annually, notwithstanding the resolution of the board of trustees and the notice of the election were silent on that subject.[78]

Elections for school bonds must be held with scrupulous care, and especially in substantial compliance with the statute. A vote of the district is requisite for the issue of bonds.[79] And if there is not an observance of the formalities prescribed in the calling or conduct of the election, there is a fatal defect. Thus, in an election for school bonds, the notice, either posted or published, calling the election, variously described the place where the election would be held, as "at the hall in the town of Caruthers", "at the public

[76] Chico High School Board v. Supervisors (1897), 118 Cal. 115, 50 Pac. 275; Board of Education v. Board of Trustees (1900), 129 Cal. 599, 62 Pac. 173.

[77] Chico High School Board v. Supervisors (1897), 118 Cal. 115, 50 Pac. 275.

[78] County of Kings v. Rea (1913), 164 Cal. 508, 129 Pac. 772.

[79] Cal. Pol. Code, § 1880.

Digitized by Google

schoolhouse in the town of Caruthers", "at the schoolhouse in Caruthers school district". The court said that it was unable to say that the town hall and the public schoolhouse in the town of Caruthers were the same place, or that the schoolhouse in Caruthers school district and the public schoolhouse in the town of Caruthers referred to the same building. It was accordingly held that there was no requirement of the election law more important in its observance than that the notice should correctly state where the election was to be held, and, hence, where the notices were inconsistent, contradictory and misleading, the election was invalid.[80]

In Oakland, San Francisco and Los Angeles, the question has arisen whether the issuance of bonds for school purposes in a school district embraced in whole or in part within the city limits is, or may be, a municipal affair. In Oakland,[81] and in San Francisco,[82] it was held that the city might bond itself, issuing municipal bonds, for the acquisition of land for school purposes and for the building of schoolhouses. In the Los Angeles case,[83] in which it was contended that the Oakland and San Francisco cases established by implication that all matters within the corporate limits of a city were "municipal affairs", it was held that this was in no sense true, and that the school district of Los Angeles was not debarred from issuing bonds of the school district by the fact that it was included within the limits of the municipality. These cases are mentioned here merely for the sake of completeness, having been more fully reviewed in a previous chapter.[84]

School moneys.—Two actions were brought, one against the County of San Diego,[85] the other against the County of San Luis Obispo,[86] for the recovery of taxes paid, in the former case to San Diego City School District, in the latter to a Union High School District. In both cases it was held that the action had been brought against the wrong party defendant. The grounds of the decisions were that the county as such has no interest in the funds of a

---

[80] People v. Caruthers School Dist. (1894), 102 Cal. 184, 36 Pac. 396.
[81] In re Wetmore (Wetmore v. Oakland) (1893), 99 Cal. 146, 33 Pac. 769.
[82] Law v. San Francisco (1904), 144 Cal. 384, 77 Pac. 1014.
[83] Los Angeles City School District v. Longden (1905), 148 Cal. 380, 83 Pac. 246.
[84] 2 Cal. Law Rev. 469-471.
[85] Pacific Mut. Life Ins. Co. v. San Diego County (1896), 112 Cal. 314, 41 Pac. 423, 44 Pac. 571.
[86] Elberg v. San Luis Obispo County (1896), 112 Cal. 316, 41 Pac. 475, 44 Pac. 572.

Digitized by Google

school district, nor any control over the same in the county treasury;[87] and it was not the intent of section 3819 of the Political Code to permit an action against a county to recover taxes paid to and held by its officials, neither for the benefit of the county nor subject to its disposition, but for the use of, and to be disbursed by, a distinct organization—a local district within the county. But, on the other hand, it has been held that a school district has no proprietary right to the money to its credit in the county treasury, and hence cannot recover it from the county superintendent who has erroneously transferred it to other school funds of the county.[88]

William Carey Jones.

Berkeley, California.

---

[87] Cal. Const., art xi, § 16; 1893 Stats. Cal. 272.
[88] Gridley School Dist. v. Stout (1901), 134 Cal. 592, 66 Pac. 785.

Digitized by Google

The Proposed Expert Evidence Bill

HARDLY any defect in the administration of the law has been so much exploited as that connected with expert testimony. It has been for years the theme of bar association meetings, medical societies and other similar bodies, yet nothing has been accomplished, in the way of remedy, from all this discussion. Under the present system of expert testimony, each side calls its own experts who testify in open court subject to cross-examination. The evils of the system are conceded and are many.

I. Method of selection.

1. The parties and their attorneys are seldom in a position to know who are the real experts in a subject. Some presumptuous, plausible charlatan, who advertises himself widely often usurps the place of the expert in the public eye. "The colossal impudence" of these "experts" is a constant source of amazement to those who are eminent in the profession.

2. Many experts are consulted by litigants, but only those are chosen who will testify favorably. The honest expert seldom gets a chance unless the attorney knows in advance that his testimony will be favorable to his client in all respects. The advantage thus given to dishonest witnesses, who will testify according to the necessities of the case is evident.

3. The expert is selected not as other witnesses, because acquainted with the facts of the particular case, but to draw from the facts conclusions which the layman is unable to do. The expert is thus selected by the party to advise him as to correct conclusions, much as the lawyer is selected to explain the law. The lawyer, however, never alters his character of adviser and advocate. If he takes the stand to testify in an endeavor to win a case for a client, he subjects himself to well deserved criticism.[1] The expert alone combines the incompatible functions of adviser and witness. The situation is anomalous. It is difficult for the most honest expert to avoid the natural bias which comes from espousing one side of a case and studying it thoroughly. Unconsciously the impartial expert becomes a partisan like the lawyer.

---

[1] Canons of Ethics of the American Bar Association, § 19.

Digitized by Google

4. The foregoing and subsequent objections are felt so keenly that many competent experts will not appear in court where their appearance necessarily subjects them to the imputation of dishonesty, and where the methods of examination are incompatible with truth and dignity.

II. Examination of the expert.

1. The method of examination by question and answer is well calculated to mislead. The attorney calling the witness asks such questions, and puts them in such form, as will elicit answers favorable to his side. The expert has been allowed to present only a portion of the case. Either the rest of the case is not brought out by cross-examination, in which event the expert appears to have given an opinion favorable to the side on which he was called when on the merits of the whole case his opinion would be different, or if the other facts are brought out by cross-examination, the expert, through no fault of his own, is made to appear to have concealed the truth. The expert should be permitted to draw his conclusions with the explanations and qualifications necessary to accuracy.

2. The technical applications of the rules of evidence, especially those relating to the opinion rule and to the hearsay rule, are serious impediments to the expert presenting the truth as he sees it.

3. The expert may be continually interrupted by objections on direct examination, and he may be badgered and brow-beaten on cross-examination. By the clever tricks of a skillful lawyer an able expert may sometimes be made to appear in a foolish light.

III. Decision of the case.

When the experts disagree the decision must be left to a non-expert tribunal, the judge or the jury as the case may be. This is but little better than tossing up a coin. The parties have simply put themselves upon the ignorance of the court.

For these unquestioned evils there are, as Judge Melvin once remarked in another connection, remedies "as numerous as prescriptions for the cure of rheumatism and generally about as useful". For the selection of experts it has been suggested that they be chosen by the court, either reserving the right of the parties to call additional witnesses, or denying such right; that the selection of the court be unassisted, or that the selection be made from an official list chosen in some other manner; that the official

Digitized by Google

list be either permanent or a special list for each case. In regard to the examination of witnesses, it has been recommended that the examination be by the court, with or without the right of the parties to cross-examine. It has also been recommended that there be no examination at all, but that the expert testify in the form of a report. In regard to the decision where experts disagree, it has been recommended that a jury of experts be selected, that an expert sit with the judge during the trial and advise him, that the questions on which expert testimony is required be submitted to an expert, as referee, to make a report binding on the judge and jury. Many modifications of these suggestions are possible. It is obvious that some of them are inconsistent with others, and that it would be an impossible feat to draft a bill that would cure all the evils. The admitted evils create an insistent demand for a remedy, but there is also the logical possibility that no remedy exists, or that any proposed remedy brings in its train new evils worse than the diseases which it cures. A proposed measure must therefore pass the following tests:

1. It must cure a certain evil.

2. It must not cause evils more serious than those that are cured.

Let us apply these tests to the proposed bill now pending before the legislature of the state of California, which reads as follows:

> An act to amend the Code of Civil Procedure of California by adding thereto a new section to be numbered and known as section 1871, relating to experts, their appointment by the court, or a judge thereof, and providing for their compensation and manner of examination as witnesses.
>
> *The people of the State of California do enact as follows*:
> Section 1. A new section is hereby added to the Code of Civil Procedure of California, to be numbered and known as section 1871, and to read as follows:
>
> 1871. Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil or criminal, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of

Digitized by Google

such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable. In all criminal actions and proceedings such compensation so fixed shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court or judge. In all civil actions and proceedings such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court or judge may determine and may thereafter be taxed and allowed in like manner as other costs. Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees. Any expert so appointed by the court may be called and examined as a witness by any party to such an action or proceeding or by the court itself, and, when called and examined by the court, may be cross-examined by the several parties to the action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party. The court or judge may, at any time before the trial or during the trial, limit the number of expert witnesses to be called by any party.[2]

The bill does not do away with partisan witnesses. Each side can still call its own experts. The evils connected with such witnesses therefore remain. That the bill is wise, however, in thus allowing the parties to call their own experts, seems beyond serious question. In a personal injury case, for example, no witness can ordinarily contribute so much of fact as the physician who has attended the plaintiff. In determining value for rate fixing and for other purposes, who is so well equipped to explain the matter to the tribunal as the engineer who has constructed the plant, and who has spent years in study of every item on the schedule? It is true that such a witness may be biased, but the court or jury can take that matter into consideration. Such witnesses are really

[2] Senate Bill No. 13, introduced by Senator Jones, Jan. 7, 1915.

Digitized by Google

testifying to facts as well as to opinions. Their position is very different from that of the expert who testifies entirely on the basis of a hypothetical case; or as a law-student once expressed it, "Expert testimony is always founded on fictitious facts". The exclusion of experts, who know the most about the subject matter, on the ground of interest is as foolish as the common law disqualification of the parties to the action as witnesses, a disqualification that has been almost entirely abolished in every jurisdiction. No solution of this problem can be considered for a moment that suppresses material testimony. Yet it is against the expert witness who acts as an adviser, that most of the criticism is directed.

The amendment does not purport to remedy the difficulties connected with the examination of witnesses In preserving the right of cross-examination the bill is conservatively wise. It is, of course, from the point of view of the expert, conducive to his professional dignity to be "sedulously shielded and graciously encouraged" by being allowed to pronounce an *ex cathedra* opinion. Professional dignity, however, must not be conserved at the sacrifice of truth. Experience has shown that even competent experts make mistakes. To remove the check of cross-examination is to take away the most effective instrument ever devised for the discovery of error. The amendment does not purport to touch the decision of matters where the expert testimony is in conflict.

The scope of the amendment being thus limited, it is evident that it falls short of being a panacea for all evils. About all it purports to accomplish is to put those witnesses appointed by the court in a nonpartisan position. There are serious objections, however, to the bill:

1. In criminal cases the compensation is a charge on the county. The danger is serious that some defense like insanity will be set up in every case where there is the slightest opportunity. It does not cost the defendant anything; the county pays the bill. It will be remembered that the immediate effect of the adoption of section 1247 of the Penal Code, providing for the writing up of all the evidence in criminal appeals at the expense of the county, was that appeals were taken simply to give the reporter a job. By the proposed amendment the county is saddled with liability indefinite and unlimited in amount. In civil cases the effect is even more dangerous. The cost is apportioned in the first place, and finally charged on litigants as other costs. A poor litigant may easily be ruined by the calling of expensive experts by the other side.

Digitized by Google

2. The bill provides that the court or judge may appoint experts. Does this mean that it is compulsory upon the expert to testify? Will it be satisfactory for an engineer, with a high salary and under contract to his employer, to be called upon to make investigations and to testify for such compensation as may be awarded by the court? If testimony is not compulsory, and to make it compulsory would probably be unconstitutional, the expert will necessarily want to know what his compensation will be, before he can agree to investigate a matter and stand ready to testify on the trial, whenever that shall take place, and for as many days as the trial may continue. Under the present system the matter is adjusted by the bargaining of the parties. The court is in no position to make such arrangements. The example of Germany is cited, but it must be remembered that the conditions are very different. The entire educational system of Germany is devised for the purpose of training experts to carry on the public work. In educational as well as other matters there is a quasi-military organization. The state trains up its experts on every subject, and it is the natural thing, and is understood by everyone, that the government should call upon these experts when it needs them. There is not in Germany what has been termed "that exaltation of incompetency and distrust of competency in special fields which seems to be an unhappy by-produce of democracy".

3. The court is in no better position to choose experts in the medical profession, in the engineering profession, or in any other profession in which expert testimony is required, than are the litigants. It cannot be too strongly emphasized that a general knowledge of a subject does not make an expert. It is probable that the doctors in California competent to testify as expert alienists in a contested matter could be counted on the fingers of the hand. Is it a fact that the judges show any peculiar ability in the selection of their own private physicians?

4. There is grave danger in allowing the judge to select his own experts. He will naturally be inclined more favorably to his own witness. In some fields in which expert testimony is required, such as in rate-fixing regulation, the competent men are few; they have usually been retained either by the utility or by the state. These men are on record with definite views, honestly entertained, on questions not yet finally determined by the Supreme Court. The judge could hardly be expected to know this bias

Digitized by Google

and it would be difficult for a party to make an affidavit of prejudice; nevertheless, the decision of that expert could be predicted in advance, by those familiar with his views. Apparently the court may call witnesses at any time of its own motion, with no opportunity by the parties to make objections or to know in advance of the trial the witnesses that may be called. As the court has no special qualifications for determining the competency of experts, there is danger in the artificial weight given to those selected by the court. The foregoing considerations have led the Michigan court to go perhaps too far in declaring the following section of an act unconstitutional:[3]

> "Sec. 3. In criminal cases for homicide where the issues involve expert knowledge or opinion the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either prosecution or defense from using other expert witnesses at the trial."

5. The selection of expert witnesses is an undesirable power to put in the hands of judges. Under the present system of choosing judges by two popular elections, primary and general, the judge, to secure his re-election, must have many friends working for him. He is in much the same position as the expert who is not called unless he will testify favorably. Unless the judge does politics he will not be a judge. No one is a more effective vote getter than the type of physician known as the "political doctor". It need occasion no surprise to see the political doctor selected as an expert in return for election services, especially since the judge has no divining rod to discover the real expert. Lawyers will recall that the power of the court to appoint an attorney for minor heirs involved the judges in much criticism, usually, it is true, undeserved. The probability of such criticism led more than one judge to avoid probate cases until the law was repealed.[4] Fixing the compensation of executors, administrators and their attorneys caused so much trouble that an arbitrary standard was adopted by the legislature,

---

[3] People v. Dickerson (1910), 164 Mich. 148, 129 N. W. 199. (The opinion is not based entirely on the provision that the court shall make known to the jury who the court witnesses are.)

[4] Cal. Code Civ. Proc., § 1718, repealed, 1903.

Digitized by Google

with a very limited power in the court of modification.[5] At the present time we see a single inheritance tax appraiser superseding the appraisers appointed by the court for each case. The blemishes in the careers of Lord Macclesfield, Lord Eldon and other eminent judges arose from this power over patronage and fees.[6] Experience abundantly demonstrates that the less power a judge has to favor his friends by lucrative appointments, the better able he is to perform his judicial duties.

A bill that accomplishes so little and that raises so many difficulties can hardly be considered expedient. It is highly significant that the long continued agitation for reform has resulted in almost no legislation. Does not this indicate that the evils are of a kind that cannot be cured by passing a statute? In the selection of experts no solution can be considered satisfactory that does not provide for the selection by the profession involved. The members of each profession know their own experts but not those of other professions. In these days of specialization the expert in one branch of a subject has no peculiar qualifications in the others. Would it not be possible for the judges, the medical societies and the bar associations to get together and agree that where a case involves medical expert testimony, unless the parties themselves can agree on experts, the judge shall select from a list, made up by the medical association, of those qualified to testify in that particular kind of case? No one is entirely satisfied with the present order of things. The arrangement suggested has operated with success in some places.

> "In many of our cities an understanding exists between the bench and the medical profession that certain men known to be distinguished in a special department of practice shall be regarded as eligible experts, and from a list of these a choice can be properly made. This has not been made mandatory by statutory enactment, but it has been found to be a feasible solution of many difficulties and has greatly facilitated the trial of insanity and other cases where special technical knowledge is demanded of the witness."[7]

All it needs is a willingness in the judges and lawyers to try it, and above all a willingness on the part of experts in the medical

---

[5] Cal. Code Civ. Proc., §§ 1618, 1619.
[6] Campbell, Lives of the Chancellors, vol. iv, p. 554; vol. vii, p. 677.
[7] Andrew Stewart Lobingier, A.B., M.D., Medical Expert Testimony.

Digitized by Google

profession to make a sacrifice of time and money to accomplish this improvement. Perhaps in time, if the arrangement works out successfully, it would be possible to compensate the experts adequately for their services. Other professions can work out their problems along similar lines.

In the examination of experts the improvement must come from the lawyers. If the tactics of counsel are obstructing the truth the court must assert its power. The most serious handicap on the court in this connection is the prohibition against the judge commenting on facts.

> "But there is general concurrence among those who have studied the subject in the view that if trial judges were given the power to deal with expert evidence effectively in the charge to the jury, and if they were so selected as to put men of proper caliber upon the bench the question would largely solve itself."[8]

The rules of evidence put very few obstacles in the way of an expert stating his opinion. Unfortunately a contrary view still prevails among a number of persons in the profession. The pioneer conditions of the West produced an untrained bench and bar. As usual the ignorant lawyer is very proud of his knowledge of technicalities, a knowledge which on investigation usually proves to be of things which are not so. The artificial rules invented by a misguided generation remain to trouble the profession today.[9] The modern appellate courts are engaged in clearing away this mass of technicalities, but in the trial courts they are too often enforced. It is impossible to examine the foundations of every question of evidence that comes up during a trial. The most scholarly practitioner must accept much of the routine of trial practice without examination. Again, it does not pay to take chances by putting in evidence, the admissibility of which is doubtful. It is surprising, however, how many of the exclusionary rules, assumed in practice, are really opposed to the weight of authority. An example of this is to be found in a very able address delivered at a joint meeting of the San Francisco Medical Society and the

---

[8] Preliminary Report on Efficiency in the Administration of Justice. The National Economic League, 6 Beacon St., Boston, Mass., p. 27.

[9] See Wigmore on Evidence, § 1917, for the history of the unfortunate American doctrines on the opinion rule.

Digitized by Google

San Francisco Bar Association.[10] The following quotation is from this address:

> "For instance, a medical attendant will not be permitted to give an opinion based upon his own personal observation of a patient and the history of the case as related by the patient. What the patient has told him is regarded as hearsay. In dealing with the case privately the physician forms his opinion and acts upon what he discovers objectively and the history of the case. In court, however, while his testimony is receivable as to objective symptoms, he cannot testify as to subjective symptoms nor can he give the history of the case. Therefore, when asked his opinion as an expert he bases it partly on his personal knowledge and partly on the history of the case as given by the witnesses in court, not as given to him privately."

While there is some conflict of authority on the use of declarations of pain to prove that fact, discriminations being made in various jurisdictions between, for example, declarations of present and past pain, and between spontaneous and narrative declarations, it is generally conceded that the physician is entitled to use such declarations as one of the grounds of his expert opinion.

> "In the preceding section we alluded to the inadmissibility of a statement of a party that he suffered pain, made long after the injury; but when a *physician* is called as an *expert*, his evidence is not thus limited. He may base his opinions upon a statement given by the patient in relation to his condition and sensations, past and present. Thus only can the expert ascertain the condition of the party; and he may, of course, be guided to some extent by the data thus furnished."[11]

Rightly understood the rules of evidence offer few embarrassments to the complete statement of the case by an expert. In the decision on matters affecting expert testimony, greater difficulty may be experienced. With the consent of the parties, however, it is always possible to appoint expert referees.[12] For the improvements above suggested little or no change in the law is required.[13] The cause of the disease of expert testimony lies in the ignorance of the professions and in their lack of organization. An act like

---

[10] Address by William M. Cannon, San Francisco Recorder, Oct. 17, 1914.

[11] Jones, Commentaries on Evidence, § 349a. See also Chamberlayne, The Modern Law of Evidence, § 2635 and cases cited, including People v. Shattuck (1895), 109 Cal. 673, 42 Pac. 315; Wigmore on Evidence, § 1720.

[12] Cal. Code Civ. Proc., §§ 638-645.

[13] Wigmore on Evidence, § 562.

Digitized by Google

the one proposed cures a symptom, but as so often happens, turns the disease into another and perhaps more dangerous form. It is pathetic to see the efforts that well meaning reformers make to accomplish a reform by an act of the legislature. If it could only be understood that improvement is a slow process requiring men better trained in the profession, with high ethical standards. The professions must be well organized among themselves so as to know who their real leaders are. They must be able by their organizations to exert an influence upon the other professions. A public opinion must be created that will drive from the courts the incompetent and the dishonest.

For procedural difficulties, the inherent powers of the court are sufficient if there is the desire to use them.[14] The thing most to be avoided is legislation which will restrict the use of expert testimony and confine it to certain forms. The thing required is a flexibility in procedure that will enable the court to select that method which may best suit the particular case; this may be by experts chosen by the parties, by the judge, by the profession, testifying in court, or filing a report; or any other fair procedure may be adopted that will assist a just decision. We must realize that the fault is in ourselves and can be cured only by continuous effort along practical lines of education and a better mutual understanding. Can we not stop this everlasting rush to the legislature to pass bills to make men competent and honest?[15]

A. M. Kidd.

Berkeley, California.

---

[14] This was recently demonstrated in San Francisco where it was discovered by Presiding Judge Sturtevant that the court possessed the power to make all rules considered desirable for the expedition of business without resort to the legislature. The co-operation of the judges and lawyers is all that is necessary for efficiency in administration.

[15] It may be interesting to note in this connection that the American Institute of Criminal Law and Criminology after several years' work by an able committee has recommended only one bill, a bill confined to expert testimony in cases involving mental disease. Journal of the American Institute of Criminal Law and Criminology, vol. v, pp. 643-652. This bill embodies the valuable permission for the experts to consult before the trial. The right of cross-examination is also preserved. It is necessary to test the opinion of experts even where they agree. The case of Doolin v. Omnibus Cable Co. (1899), 125 Cal. 141, 57 Pac. 774, is still fresh in mind, where the experts on both sides agreed that the plaintiff was suffering from a tumor. Ten days after the trial she gave birth to a child and it was then admitted she had not suffered from a tumor at all.

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year Single Copies, 50 Cents

A. M. KIDD, Editor-in-Chief
H. S. DON CARLOS, Student Editor-in-Chief

Faculty Board of Editors

WM. CAREY JONES A. P. MATTHEW
WM. E. COLBY M. C. LYNCH
M. E. HARRISON

Student Board of Editors

V. M. AIROLA O. F. MONTANDON
ARTHUR ALTYN J. S. MOORE, Jr.
J. C. ALTMAN J. B. OLIVER
A. H CONARD J. D. RINEHART
T. A. J. DOCKWEILER C. R. SALISBURY
G. H. GOBAR E. J. SINCLAIR
LYMAN GRIMES G. W. WORTHEN

EDITORIAL NOTES

SCHOOL OF JURISPRUDENCE NOTES

THE 1915 Summer Session of the University of California will begin on June 21 and end on July 31. The School of Jurisprudence is fortunate in having secured Samuel Williston, Professor of Law in the Harvard Law School, and Raleigh Colston Minor, Professor of Law in the Law School of the University of Virginia. Professor Williston is well known to the profession as the author of the text book on Sales and as the editor of Wald's Pollock on Contracts. He will repeat the course in Contracts given by him in Berkeley during the summer of

Digitized by Google

1909, and will delight another set of students with his incomparable skill in analysis and teaching method.

Professor Minor is perhaps best known to lawyers as the author of the standard American treatise on the Conflict of Laws. He will give that subject during the Summer Session. Conflict of Laws is, perhaps, the most difficult subject studied in the law school; its practical importance and the fact that it is not given in all schools will lead many to embrace the opportunity of studying this branch of the law under the recognized authority. Dr. Maurice E. Harrison of the San Francisco bar and lecturer in the School of Jurisprudence will give a course in Commercial Law.

Of recent years the interest of the legal profession has been increasingly directed to the social effects and tendencies of law. Particularly is this true in the field of criminal law, where the prevention of crime and the treatment of criminals are attracting the attention of lawyers hitherto exclusively engrossed in the legal definition of crimes and in the procedure to secure convictions. A solution of the problems of criminology requires a careful study of defective persons. The course in the Summer Session this year by Dr. Henry Herbert Goddard, Director of the Department of Research at Vineland, New Jersey, comes at an opportune time. Dr. Goddard is one of the two or three men of national reputation in this line of work. His course at the Summer Session should mark the beginning of a successful movement to establish a school where those who have the care and treatment of defectives and criminals may receive proper instruction.

Digitized by Google

Notes and Correspondence

FAR EASTERN BAR ASSOCIATION

The organization of a Far Eastern American Bar Association is an event of much significance in the legal world. It will be remembered that Judge Lobingier of the United States Court for China, who has been elected the first President of the Association, delivered a course of lectures on the Roman Law last spring before the School of Jurisprudence at Berkeley. The following account is taken from the China Press.

> "The Far Eastern American Bar Association, designed to bring into co-operation American lawyers not only in China and Japan, but the Philippines as well, to which reference was made in The China Press of Sunday, was formally organized at a meeting held in the sessions room of the United States Court for China, yesterday. Mr. S. Fessenden, acting chairman, presided and there were also present Judge C. S. Lobingier, Dr. F. E. Hinckley, Messrs. J. W. Rice, C. R. Holcomb, A. S. Allan, J. B. Davies, M. L. Heen, H. D. Rodger, A. P. Bassett, W. S. Fleming and E. B. Rose.
>
> "Mr. Fessenden stated that drafts of the proposed constitution had been sent out and had been signed by all resident members of the American bar in Shanghai except two . . . The association contemplated something more than attending to purely local affairs, which was why it carried the name of the Far Eastern Association and it was intended also, if possible, to affiliate with the American Bar Association and to extend its membership to the Philippines.
>
> "Judge C. S. Lobingier was nominated as first President, Mr. Fessenden remarking that he was in a far better position than anyone else to push the association along and also obtain the co-operation of lawyers in Manila, whilst he might help them as well to get affiliation with the American Bar Association.
>
> "The appointment was agreed to unanimously and Judge Lobingier said that he hoped the association would be a genuine affair and not in any sense an official body. He could tell them that Governor Gilbert of Manila had expressed his interest in it and had said that he would do all he could to further its interests.
>
> "Mr. E. P. Allen, of Tientsin and Mr. A. P. Bassett, of

Digitized by Google

Shanghai, were elected vice-presidents and Mr. E. B. Rose secretary and treasurer. The executive committee will be nominated by the President."

LIMITED LIABILITY OF SHIP OWNERS

The importance of encouraging maritime adventures led the continental seafaring nations during the middle ages to limit the liability of the owner of a ship to the ship itself. It may be questioned whether the modern development of insurance has not rendered these special privileges unnecessary. Commercial rivalry in the development of a merchant marine, however, forces each nation to accord to its shipping interests the privileges granted by its competitors. This was the justification for the Harter Act, exempting the owner from liability for certain losses incurred in the carriage of goods. The same excuse, however, does not exist for the limitation of liability acts. In England, the liability of the owner is limited to the value of the ship before the accident. In the United States it is the value of the ship after the accident. In the United States, therefore, it becomes to the interest of the ship owner to economize at the risk of life. For example, a saving in the consumption of fuel is made by hugging the shore dangerously close. When, in the exceptional case, an accident occurs, the ship owner gets full insurance from the insurance company, and leaves a vessel at the bottom of the ocean as the only asset out of which damages can be recovered for loss of lives and property. With this premium on taking chances it is no wonder that shipping interests are slow in applying the slogan "Safety First", which has been adopted with such success by the railroads. The shipping interests evidently feel that the present Congress will insist on some form of liability. In "The Survey" for December 5, 1914, Volume 33, Number 10, is an account of the ingenious device which a shipping company has adopted to forestall Congressional action by incorporating separately each one of the vessels in its fleet. Equally ingenious is the method suggested by the writer of the article, Mr. Thomas I. Parkinson, of the Columbia University Legislation Drafting Bureau, by which the circumventors may be circumvented.

Digitized by Google

Comment on Recent Cases

ANIMALS: MEASURE OF DAMAGES FOR LOSS OF DOG.—An indication that the spirit of commercialism has not yet invaded the bench and that at times law tinged with sentiment makes justice, can be read in Judge McNary's opinion in *McCallister v. Sappinfield,*[1] on the criterion of value of a Scotch collie dog. The dog in question was well trained; in his master's words, "I could send him after a band of goats, half a mile, and he would round them up and bring them in, and the same with driving cattle", and "he was more useful to me than a span of horses." Another phase of his character was shown by these words, "She [plaintiff's wife] wasn't afraid to stay because the dog was a protector to her." This evidence was objected to by the defendant who killed the dog, as not being confined to its market value, being rather a recital of its traits, habits and intelligence. He asked that the damages be set at the market value. Whether other considerations such as usefulness, fidelity, affection and pedigree were to influence the damages was the question for the court.

There is still some doubt on the exact status of the dog. This is odd when one considers his intimate relationship with man, and that, as Cuvier[2] says, "the dog was perhaps necessary to the establishment of civil society, and a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog."[3] Going back to the beginnings of history we find that the ancients ate puppies as a delicacy and offered them in sacrifice to their Gods. The dog was a part of the agricultural establishment of the Romans and was treated as such. There were the *canes villatici,* to guard the villa of the Roman senator, the *canes venatici,* accompanying him on his hunting expeditions, and the *canes pastorales* by whom his flocks were guarded. Virgil in his Georgics has given directions as to their management and education.

Blackstone[4] among others is responsible for the dog's dubious standing in the English community, defining him as one of those animals that do not serve for food and which therefore the law holds to have no intrinsic value. He adds, that "though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that

---

[1] (Ore., Sept. 22, 1914), 144 Pac. 432.
[2] Cuvier, "Animal Kingdom".
[3] 7 Edinburgh Enc. 646.
[4] 4 Blackstone Commentaries 235.

Digitized by Google

the crime of stealing of them amounts to larceny." So they are branded as *ferae naturae* and utterly worthless.

Meantime the dog has risen in the estimation of the law so that today he is said to be subject to ownership.[5] Trespass will lie for an injury to him. Trover is maintainable for his conversion.[6] Replevin will restore him to the possession of his master.[7] He may be bought and sold and an action will lie for his price. He is now the subject of larceny in most states.[8] In fact, he has been held property under the due process clause of the constitution.[9]

It is only necessary to mention in passing, the high place in man's affection the dog has always held, that poets have been glad to sing his praise, as witness Sir Thomas More's, "Whosoever loveth me loveth my hound", and that other verse "There is no dog so sad, but he will wag his tail." That the dog has a place in politics is familiar to all who remember the campaign song of 1912, "You've got to quit kickin' my dog aroun'." Taking all this into consideration the court rightly held that the owner of a dog is not circumscribed in his proof to its market value.[10] The peculiar facts of each case must be taken into consideration by the jury. If it is competent to show pedigree and different strains of blood upon the question of value of horses and cattle and even sheep and swine, surely the same can come into discussion here, for there are high and low degrees among dogs as well as men. Judge Wilkes, that eminent authority on and lover of dogs, speaking on the registration books of pedigrees, says,[11] "These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths and marriages are received with regard to the human family. It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but, inasmuch as dogs have no relatives competent to make entries for them, it is allowable

---

[5] Hurley v. State (1891), 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

[6] Mullaly v. People (1881), 86 N. Y. 365.

[7] Lynn v. State (1894), 33 Tex. Crim. Rep. 153, 25 S. W. 779.

[8] Johnson v. McConnell (1889), 80 Cal. 545, 22 Pac. 219. From 1873 to 1887 the value of a dog as the subject of larceny was one dollar, but since that time his value is to be estimated in the same manner as other property. Cal. Pen. Code, § 491.

[9] Jenkins v. Ballantyne (1892), 8 Utah 245, 16 L. R. A. 689, 30 Pac. 760.

[10] Sedgwick on Damages, 9th ed., §§ 251, 251A; Heiligmann v. Rose (1891), 81 Tex. 222, 26 Am. St. Rep. 804; Spray v. Ammerman (1872), 66 Ill. 309; Uhlein v. Cromack (1872), 109 Mass. 273; Hodges v. Causey (1900), 77 Miss. 353, 26 So. 945, 48 L. R. A. 95, 78 Am. St. Rep. 525.

[11] Citizen's Rapid Transit Co. v. Dew (1898), 100 Tenn. 317, 45 S. W. 290, 40 L. R. A. 518, 66 Am. St. Rep. 745.

Digitized by Google

for such entries to be made by the owners, friends and admirers of the dog."

To quote the court's own language, "To assist in the proper determination of the value of dogs experts may be allowed to give their opinions, ... evidence of a dog's pedigree, and of the qualifications and performances of his ancestors is competent, as well as testimony relative to his own peculiar characteristics and qualities."[12]

The admission of such evidence is merely an application of the general rule of damages exemplified in actions for the loss of family portraits and works of art that cannot be replaced. That damages should not be given for the *pretium affectionis* can be grasped by the legal mind, but were Kipling a judge he would have ruled otherwise, as witness, "but a dog with whom one lives alone for at least six months in the year; a free thing, tied to you so strictly by love that without you he will not stir or exercise; a patient, temperate, humorous, wise soul, who knows your moods before you know them yourself, is not a dog under any ruling."

But as the courts offer no pecuniary balm for the anguish caused by the dog's demise,

"So why in Heaven (before we are there!)
Should we give our hearts to a dog to tear."

L. G.

CONFLICT OF LAWS: GUARDIAN'S BOND: ACTION UPON IN FOREIGN JURISDICTION.—The case of *Hays v. King*[1] decides that a surety on a guardianship bond, executed in Arkansas pursuant to the laws of that state, may, upon his removal to Oklahoma, be sued in the courts of the latter state for a breach of the bond, the action being transitory in its nature. The laws of the two states for the enforcement of the liability were substantially the same[2] and consequently the court was not "called upon to enforce, or to put into active operation, the statutes of Arkansas". The rule has been applied to administrator's bonds,[3] bail bonds,[4] actions *ex delicto* founded on tort,[5] stockholder's liability,[6] right of recovery under a

---

[12] Quoting from 1 R. C. L. 1130.

[1] (Oct. 27, 1914), 143 Pac. 1142.

[2] Wooden v. Western N. Y. & P. R. Co. (1891), 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

[3] Johnson v. Jackson (1876), 56 Ga. 326; Cutrer v. State of Tennessee (1911), 98 Miss. 841, 54 So. 434, commenting adversely upon ruling in Judge of Probate etc. v. Hibbard (1872), 44 Vt. 597, 8 Am. Rep. 396.

[4] Otis v. Wakeman (N. Y., 1841), 1 Hill 604, dictum.

[5] Burns v. Grand Rapids etc. R. Co. (1888), 113 Ind. 169, 15 N. E. 230; Leonard v. Columbia Steam Nav. Co. (1881), 84 N. Y. 48, 38 Am. Rep. 491.

[6] Rhodes v. United States Nat'l Bank (1895), 24 U. S. App. 607, 34 L. R. A. 742 and note thereto. Contra, Marshall v. Sherman (1895), 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757.

Digitized by Google

workman's compensation act,[7] and the enforcement of a police regulation of another state,[8] but, it has never been extended to actions purely penal in their nature.[9] If enforcement is sought in a jurisdiction other than that where the cause of action arose the mode of procedure and the remedy are governed by the *lex fori*, the construction of the statute, or the contract, and the obligations arising under it by the *lex loci contractus*.[10]

It is a well recognized principle that the statutes of one state have, *ex proprio vigore*, no force or effect beyond the jurisdiction but are only enforced in another state through comity. The question is presented as to whether a liability arising in another jurisdiction will be enforced where the state in which the action is brought has no statute on the subject or a statute differing substantially from that of the other state. If a liability is conditioned on being enforced by a peculiar procedure, the remedy prescribed being special and exclusive, the cause of action is not transitory.[11] The reason is that the courts of the foreign jurisdiction have not adequate machinery for the enforcement of the action or the application of the remedy. The rule in some jurisdictions is that if the liability arises through a statute and is not recognized by common law or statute of the state where the relief is sought, the action will not lie.[12] However, a few of the earlier authorities have laid down the better rule which is followed by later decisions. In cases of other than penal actions a liability arising out of foreign law, if not contrary to public policy, or to abstract justice and pure morals, or calculated to injure the state and its citizens, will be recognized where recovery is sought if the form of procedure, and the law of trials of the jurisdiction can do substantial justice between the parties.[13] "To hold otherwise would result in total failure of justice, a result always to be shunned by the courts,"[14] leaving many liabilities justly arising to go unenforced.

C. R. S.

---

[7] Pensabene v. F. & J. Auditore Co. (1912), 78 Misc. 538, 138 N. Y. Supp. 947.

[8] Boyce v. Wabash Ry. Co. (1884), 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730; Contra, dictum, Fickering v. Fisk (1834), 6 Vt. 102.

[9] Carnahan v. Western Union Tel. Co. (1883), 89 Ind. 526, 46 Am. Rep. 175; Huntington v. Attrill (1892), 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. Rep. 224; Great Western Mach. Co. v. Smith (1912), 87 Kans. 331, 124 Pac. 414, defining what is penal.

[10] Wick v. Dawson (1896), 42 West Va. 43, 24 S. E. 587.

[11] Russell v. Pacific Ry. Co. (1896), 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747; Pickering v. Fisk (1834), 6 Vt. 102.

[12] Taylor's Admr. v. Pennsylvania Co. (1880), 78 Ky. 348, 39 Am. Rep. 244; Bettys v. The Milwaukee etc. Ry Co. (1875), 37 Wis. 323.

[13] Zeikus v. Florida East Coast Ry. Co. (1912), 153 App. Div. 345, 138 N. Y. Supp. 478. But see Whitford v. Panama R. Co. (1861), 23 N. Y. 465; Pensabene v. F. & J. Auditore Co. (1912), 78 Misc. 538, 138 N. Y. Supp. 947; Dennick v. Railroad Co. (1880), 103 U. S. 11, 26 L. Ed. 439; Burns v. Grand Rapids etc. R. Co. (1888), 113 Ind. 169, 15 N. E. 230.

[14] Cutrer v. State of Tennessee (1911), 98 Miss. 841, 54 So. 434.

Digitized by Google

CONSTITUTIONAL LAW: DENIAL BY STATE OF THE RIGHT OF FOREIGN CORPORATIONS TO DEFEND ACTIONS.—In the case of *Scott v. Day-Bristol Consolidated Mining Company*,[1] an action to quiet title was brought against a foreign corporation which claimed an interest in lands in the possession of and alleged to belong to the plaintiff. On motion the lower court struck out the corporation's demurrer on the ground that it had failed to file its articles and therefore under the provision of the Nevada statute could not defend the action. On appeal the case was reversed, the court holding that since the plaintiff had sued the defendant as a corporation, he waived any question of its capacity to defend. It is to be observed in view of this decision that the statute would seem to have little significance. If a plaintiff sues the corporation as such, he thereby waives any question of its capacity to defend; on the other hand, if he alleges in his complaint its incapacity, and brings the action against the persons deemed to hold the property as trustees, or against a receiver appointed for the purpose of the action, as was suggested by the court, clearly the latter could defend as the statute does not apply to such persons. In whatever manner the plaintiff proceeds, the right of defence, denied by the statute, still exists. Instead then of being a further check upon foreign corporations seeking to do business in the state without complying with the law, as was intended by the legislature, it really tends to place greater burdens on the person suing if he proceeds against a trustee or receiver appointed for the purpose of the suit.

From a constitutional standpoint the statute would seem to be valid.[2] It is fundamental that a corporation as such only exists in the state of its creation,[3] and that it cannot exercise the privileges conferred upon it by its charter in any other state without the latter's consent.[4] Consequently when a foreign corporation comes into a state to transact business, that state may prescribe such conditions or restrictions on its right to do business as may seem fit.[5] A foreign corporation is not entitled to "equal protection of the laws" until it has been lawfully admitted into the state,

---

[1] (Nev., Aug. 4, 1914), 142 Pac. 625.

[2] Keystone Driller Co. v. Superior Court (1903), 138 Cal. 738, 72 Pac. 398.

[3] Bank of Augusta v. Earle (1839), 13 Peters (38 U. S.) 519, 588, 10 L. Ed. 274; Rece v. Newport News & M. V. Co. (1889), 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572; Baltimore and Ohio R. R. Co. v. Glenn (1868), 28 Md. 287, 92 Am. Dec. 688.

[4] State v. Hammond Packing Co. (1903), 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; Ducat v. Chicago (1870), 10 Wall (77 U. S.) 410, 19 L. Ed. 972; Oliver v. Liverpool and London Life and Fire Ins. Co. (1868), 100 Mass. 531; State v. Phipps (1893), 50 Kans. 609, 31 Pac. 1097, 18 L. R. A. 657.

[5] Waters-Pierce Oil Co. v. Texas (1900), 177 U. S. 28, 44 L. Ed. 657, 20 Sup. Ct. Rep. 518; Hartford Fire Ins. Co. v. Raymond (1888), 70 Mich. 485, 38 N. W. 474; Connecticut Mutual Life Ins. Co. v. Spratley (1899), 172 U. S. 602, 43 L. Ed. 569, 19 Sup. Ct. Rep. 308.

Digitized by Google

because it is not a person "within the jurisdiction". Until it has complied with the laws prerequisite to its entry it therefore cannot claim the protection of this clause of the constitution.[6] Statutes denying foreign corporations, doing business in the state, the right to maintain actions unless they have done certain acts as required by law have been universally sustained.[7] It seems that the right to defend actions cannot be differentiated on principle from the right to sue and may likewise be denied to a corporation unlawfully doing business in the state. Both stand upon the same footing and are governed by the same principles. Until a foreign corporation has complied with the law and put itself in a position to demand the rights accorded to it, it cannot be heard to complain. The suggestion in the court's language that depriving a person of the right of defence would be taking property without due process, would only be applicable to corporations not doing business in the state or to those which have been expressly or impliedly recognized within its borders. Likewise conditions precedent to maintaining actions, and, on principle, to defending actions, cannot be constitutionally imposed on foreign corporations, where the cause of action arises in the course of interstate commerce.[8]

R. J. J.

CRIMINAL LAW: INTERSTATE EXTRADITION: FUGITIVE FROM JUSTICE.[1]—The sole source of the power of a state to extradite springs from article iv, section 2 of the federal constitution and sections 5278 and 5279 of the United States Revised Statutes. Judicial interpretation of these provisions makes clear that two facts must be established as a prerequisite to the exercise of the extradition power. First, a crime must be legally and substantially charged, and secondly, the person sought to be extradited must be a fugitive from justice.[2]

In cases of international extradition, evidence of criminality is required;[3] but our constitutional and congressional enactments as to interstate extradition exact proof of flight instead of evidence

---

[6] State v. Hammond Packing Co. (1903), 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; Pembina Mining Co. v. Pennsylvania (1888), 125 U. S. 181, 31 L. Ed. 650, 8 Sup. Ct. Rep. 737; Philadelphia Fire Assoc. v. New York (1886), 119 U. S. 110, 30 L. Ed. 342, 7 Sup. Ct. Rep. 108; Merchants Natl. Bank v. Ford (1907), 124 Ky. 403, 99 S. W. 260.

[7] Union Cloak and Suit Co. v. Carpenter (1902), 102 Ill. App. 339; South Amboy Terra Cotta Co. v. Poerschke (1904), 45 Misc. 358, 90 N. Y. Supp. 333; Keystone Driller Co. v. Superior Court (1903), 138 Cal. 738, 72 Pac. 398.

[8] Sioux Remedy Co. v. Cope (Nov. 30, 1914), 235 U. S. 197, 35 Sup. Ct. Rep. 57.

[1] (1901), U. S. Comp. Stat. 3597.

[2] Roberts v. Reilly (1885), 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291.

[3] 19 Cyc. 58, note 28, subtitle, "Evidence of Criminality"; 22 U. S. St. at L. 25, 1901 U. S. Comp. Stat. 3593; Benson v. McMahon (1888), 127 U. S. 457, 32 L. Ed. 234, 8 Sup. Ct. Rep. 1240.

Digitized by Google

of criminality. That is, in place of proof as to the crime itself, the fact of flight is regarded as indicative of the crime. Thus the fact that a person has fled from justice is the vital thing to be proved, and furnishes the real justification for exercising the high prerogative of sending a citizen under duress into another jurisdiction upon a mere charge of his having committed a crime.

In consonance with this apparent intention of the framers of our federal constitution, the courts have uniformly and persistently refused to consider "constructive presence" within the demanding state as being sufficient to constitute one a fugitive from justice; on the contrary, nothing short of actual physical presence within the borders of the demanding state at the time of the alleged crime has ever been held to justify a state in granting extradition papers.[4] One of the latest decisions illustrative of this general principle was handed down by the District Court of Appeal in the *Matter of the Application of Shoemaker for a Writ of Habeas Corpus.*[5] The decision is of more than passing interest, because it involves a novel state of facts, and because it presents the final step in a series of typical cases showing what constitutes constructive presence. The simplest type of case arose, where A, sought to be extradited, had never been within the demanding state. That was a case of constructive presence pure and simple, and hence extradition was held not to lie.[6] The next type of case presented this additional fact: A came into the demanding state a short time after the alleged date of the commission of the crime. The United States Supreme Court, in Hyatt v. Corkran,[7] had to pass on just such a situation, and held that A was not a fugitive from justice. In the course of his opinion, Mr. Justice Peckham stated: "It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed." The last typical situation presented itself in the Shoemaker case; there the accused was proved to have been in the demanding state a short time before, as well as after the alleged date of crime. The California court rightly held Shoemaker was not a fugitive from justice within the meaning of the extradition requirements. The language and reasoning of Hyatt v. Corkran

---

[4] State v. Hall (1894), 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289 and note thereto; Hyatt v. Corkran (1903), 188 U. S. 691, at p. 713, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456; see also collection of authorities in 19 Cyc. 87, note 19.

[5] (Sept. 30, 1914), 19 Cal. App. Dec. 470. On petition for rehearing, Oct. 22, 1914, 19 Cal. App. Dec. 525, 144 Pac. 985, 991.

[6] State v. Jackson (1888), 36 Fed. 258, 1 L. R. A. 370.

[7] (1903), 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

Digitized by Google

apply with equal force and propriety to the facts in the principal case, which represents merely a difference in degree, but not in principle.

Where, as in the Shoemaker case, there is no proof that the date stated in the indictment is erroneous, the accused need only show that he was not in the demanding state on the date charged.[8] Of course had the demanding state been able to show that the offense was actually committed on another day and that the accused was within its borders on that day, extradition would have been granted.[9] This, however, throws a difficult burden of proof upon the state. Therefore it would seem that wherever consonant with the rules of good pleading[10] in the state where an indictment, intended for use in extradition proceedings, is drawn, the crime should be alleged to have been committed "on or about" a certain day.[11]

J. C. A.

EVIDENCE: JUDICIAL NOTICE OF LOCAL OPTION ELECTION.—Courts will take judicial notice of a general law. Where a general law provides for a local election, as the "Wyllie Act"[1] in California, will the courts take cognizance of the result of that election? On this point there is a sharp conflict in the various states and the authorities are almost equally divided.[2] California, in the case of *People v. Mueller*[3] adopts the view, that although the court will take judicial notice of the terms and effect of the law, it cannot take judicial notice of the result of the local election

---

[8] State v. Schlachter (1907), 21 S. D. 276, 111 N. W. 566.

[9] Hyatt v. Corkran (1903), 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

[10] Cal. Pen. Code, § 959, subd. 5, provides that the indictment or information is sufficient if it can be understood therefrom "that the offense was committed at some time prior to the time of finding the indictment or filing of the information". For a collection of some of the authorities on the subject in the various jurisdictions see Bishop's New Criminal Procedure, § 387 and notes 75 and 76 thereto, and § 390 and notes 94 and 95 thereto. Also see 22 Cyc., p. 317, notes 71, 72 and 73, from which it appears that in a great majority of the states, including California, "on or about" a certain day, constitutes a sufficient allegation of the time of commission of a crime, except where the day is essential to the description of the offense.

[11] People v. Baker (1911), 142 App. Div. 598, 127 N. Y. Supp. 382. There the accused was proved to have been within the borders of the demanding state on January 22; the indictment charged the commission of the crime "on or about January 26". The court held the proof sufficient, "for the indictment is not limited to the date of January 26, but charges the commission on or about that date." See also Ex parte Hoffstot (1910), 180 Fed. 240, affirmed in Hoffstot v. Flood (1910), 218 U. S. 665, 31 Sup. Ct. Rep. 222, but no opinion given.

[1] Wyllie Act, 1911 Stats. Cal. 599.

[2] Chamberlayne, The Modern Law of Evidence, §§ 621, 622. The author gives the weight of authority for the view that the court should not take judicial notice under these circumstances.

[3] (October 5, 1914), 48 Cal. Dec. 359, 143 Pac. 748.

Digitized by Google

by which it is put in operation or prevented from operation. The sole reason given therefor is that the result of the local election is not a "fact established by law" within the meaning of subdivision two, section 1875 of the Code of Civil Procedure, which amounts to saying that the code is exclusive on the matter of judicial notice.

In regard to this point the late Chief Justice Beatty in a notable controversy[4] in this state, said: "The legislature of California by a constitutional law, has enumerated the facts of which courts may take judicial notice in the absence of proof, and by necessary implication has excluded all others. . . . . It was for the express purpose of defining the power of courts as to the matters they could consider without allegation or proof that this law was passed, and they are bound to obey it. No lawyer supposes that they can disregard it."

That section 1875 of the Code of Civil Procedure constitutes a limitation on the subjects of which the courts may take judicial notice seems unsound, and is inconsistent with the rulings of the court on numerous occasions.[5] In the case of People v. Schmitz,[6] the indictment was drawn on the theory that the acts of the defendant were unlawful irrespective of his official position, possibly on the theory that breach of official duty might be construed as a misdemeanor under section 521 of the California Penal Code, and not a felony under section 520. The Supreme Court, however, held that such acts, if done by private persons, constituted no crime; but it is obvious that if not criminal when committed by private persons the acts are not criminal when committed by officers, unless there is a breach of official duty. To have taken judicial notice that defendant Schmitz was mayor, or to have alleged that fact directly would not have been sufficient, without showing the means whereby money was extorted through a breach of official duty. Even if judicial notice had been taken the judgment would still have rested on issues of law and fact not alleged and not litigated. The court can hardly on demurrer take judicial notice that a defendant named Schmitz sued as a private individual is the same person as the mayor. If, however, the case were tried on the theory that he was the mayor, and if that were the only essential missing from the pleadings, the judgment might well be sustained. On the other hand the court will take judicial notice of acts performed in an official capacity. The distinction is set

---

[4] 35 Cal. Dec., letter inserted after page 485.

[5] Hughson v. Crane (1896), 115 Cal. 404, 47 Pac. 120 (the court took judicial notice of the financial history of irrigation bonds); Edson v. Southern Pacific R. R. Co. (1904), 144 Cal. 182, 77 Pac. 894, (judicial notice that few travellers between San Francisco and Fresno avail themselves of certain privileges of unlimited tickets; opinion by Beatty, C. J.); People v. Mueller (1914), 48 Cal. Dec. 355, 143 Pac. 750, (wine contains more than one per cent of alcohol).

[6] (1908), 7 Cal. App. 330, 94 Pac. 407, 419.

Digitized by Google

out in County of San Joaquin v. Budd,[7] "The court takes judicial notice of the fact as to who are the judges of the superior court of that county, and of their official acts,—that is, of such acts as can only be performed by a judge of that court in his official capacity. But the court can have no judicial knowledge that a person who is sued upon a promissory note, or made a defendant in an action to recover possession of real estate, and who may have the same name as a judge of the superior court, is in fact such judge." As the court points out, that case arose on demurrer. In the principal case, however, the question came up after verdict and the defendant could not have been misled in any way. The effect of the decision is to make the indictments in these liquor selling cases more prolix and the trials longer by the requirement of formal proof in every case of a matter which every one knows.

The function of judicial notice is to expedite trials by omitting proof of those things which it would be futile to dispute and which if disputed, would be capable of unquestionable demonstration. There can be no injustice by taking judicial notice of a fact clearly in issue for this merely means making a prima facie assumption which may be controverted by evidence. Judicial notice is one of the efficient means of shortening trials and the court should take advantage of the principle whenever it can be done without the sacrifice of substantial rights. The doctrine should not be confined to the cases for which an exact precedent can be found for neither the judges nor the legislators can possibly foresee every case that new times and new conditions will create.

T. B. R.

INSURANCE: DOUBLE INDEMNITY FOR INJURY IN PASSENGER ELEVATOR: WHAT CONSTITUTES A PASSENGER ELEVATOR.—Critics who have had little to do with the difficult art of interpretation are often heard to criticize courts because they refuse to attribute to words used in statutes or writings a uniform meaning, or because they fail to read them in a literal sense. Much unjust criticism was for instance, some time ago passed upon the Supreme Court of the United States because it read the words "restraint of trade" in the Sherman Act as in effect equivalent to "unreasonable restraint of trade". Such critics forget that the process of interpretation is not "a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the meaning of words." The judge who is a master in the art remedies "by a sort of equitable jurisdiction, the imperfections of human language and powers of using language."[1]

---

[7] (1892), 96 Cal. 47, 30 Pac. 967.

[1] F. Vaughan Hawkins, on the Principles of Legal Interpretation, reprinted in Thayer, Preliminary Treatise on Evidence at the Common Law, Appendix C.

Digitized by Google

A writer in the Green Bag a few years ago gathered together a number of instances from the decisions of the Massachusetts Supreme Court during a very short period of time showing how courts read statutes and writings so as to avoid injustice.[2] He found that the court had decided that a man who couldn't see might be an eye-witness,[3] that a staircase outside of the house might be in the house,[4] that a will giving John's three children certain property would be satisfied by giving the property to John's sister Mary's two children and his brother Ed's child.[5] Each of these decisions was, under the facts presented in the different cases, just and proper.

In *Wilmarth v. The Pacific Mutual Life Insurance Company of California*,[6] an elevator originally constructed for the purpose of carrying freight had been used by its owner to carry passengers in considerable numbers. The court had to determine whether this was a freight or a passenger elevator within the meaning of a policy of accident insurance which gave double indemnity if the insured were killed in a passenger elevator. The court held that it was a passenger elevator, within the meaning of the policy.

A couple of hypothetical cases may be stated to illustrate the difficulty of the problem which the court had to decide,—should construction or use be the test? If a statute imposed a penalty for the carriage of passengers in freight elevators, we surmise that no use could change the original character of the elevator, which must be defined by its construction. On the other hand, if a tax were levied on passenger elevators and one at a different rate on freight elevators, the use, rather than the construction would, we imagine, be held to be the governing factor.

The definition in the case under comment is more difficult than in either of these hypothetical cases. The insurance company with great force urged that when the policy was issued it had in mind an elevator equipped with the safe-guards usually provided in passenger elevators, and that it did not mean to subject itself to the additional risk involved by the insured in riding in an elevator not so equipped. On the other hand, the owner of the elevator had become liable as a common carrier of passengers,[7] and the public, including the insured and the insurance company, might reasonably expect of him a degree of care commensurate with the additional risk so as to avoid the consequences of the increased liability.

---

[2] 23 Green Bag 515.

[3] Lewis v. Brotherhood Accident Co. (1907), 194 Mass. 1, 79 N. E. 802.

[4] Nash v. Webber (1910), 204 Mass. 419, 90 N. E. 872.

[5] Polsey v. Newton (1908), 199 Mass. 450, 85 N. E. 574.

[6] (Oct. 5, 1914), 48 Cal. Dec. 366, 143 Pac. 780.

[7] Treadwell v. Whittier (1889), 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

Digitized by Google

The fact that the contract was one of insurance was the ultimate basis of the conclusion of the court, which rests its decision upon the well worn principle that all doubts in such contracts must be resolved in favor of the insured. The courts seem not to have drawn much, if any, distinction in the matter of construction between the contract to indemnify and the contract to pay double indemnity, though it has been urged with some plausibility that the latter provision ought to be construed against the insured, who is already indemnified under the general terms of the policy, and seeks to obtain a special and peculiar benefit.[8] An extreme illustration of the rigor with which accident insurance policies are construed against the company is afforded by an English case, where the company insured a man, blind in one eye, under a policy agreeing to pay a certain amount to the insured upon the loss of the sight of one eye and double the amount upon the loss of the sight of both eyes. The insured afterwards lost the sight of his remaining eye, and the company was held liable to pay him for the loss of the sight of both eyes.[9] Even the primary rules of arithmetic must yield to the presumption against the insurance company!

O. K. M.

INSURANCE: WARRANTIES: GOOD FAITH IN CONTRACTS OF FIDELITY INSURANCE.—An example of the apparent injustice of the method of construing contracts of insurance, is furnished by the case of *Wolverine Brass Works v. Pacific Coast Casualty Company of San Francisco.*[1] The plaintiff's cashier applied to the defendant for an indemnity bond. According to the stipulations of the policy which was issued, the statements or answers made in reply to a letter addressed to the plaintiff, were declared to be warranties and were made a part of the contract of insurance. These statements were made in answer to inquiries which were put for the purpose of discovering whether the applicant had been, or was at that time, in arrears or in debt to the plaintiff. On the plaintiff's assurance, made in good faith, that the applicant had never been in arrears, the policy was issued. During the life of the bond, the cashier embezzled money from the plaintiff, and later, a prior embezzlement was discovered, concerning which the plaintiff was ignorant at the time it made the above mentioned statements. The California Appellate Court ruled that these warranties being false, the policy was void *ab initio,* regardless of the good faith of the plaintiff in making them.

---

[8] Depue v. Travelers' Ins. Co. (1909), 166 Fed. 183, 189.

[9] Bawden v. The London etc. Assurance Co., [1892] 2 Q. B 534 (C.A.)

[1] (Dec. 11, 1914), 19 Cal. App. Dec. 802, rehearing denied, Feb. 10, 1915.

Digitized by Google

The decision of the court is probably correct. In ordinary contracts of insurance a breach of a mere representation does not avoid the policy, unless the breach is as to a fact material to the risk, but the slightest breach of an affirmative warranty makes the policy void.[2] The same is true in the case of fidelity insurance. A false respresentation does not avoid a policy unless it relates to a material fact, except when made in bad faith,[3] but such is not the case where warranties are involved. The courts will not interpret answers as warranties unless the language is capable of no other construction[4]. But when such answers are expressly declared to be warranties, or so interpreted, the great weight of authority is to the effect that they must be strictly complied with, irrespective of good faith, ignorance or honest intention.[5] In the case of life insurance, however, there are many authorities which hold that when the insured, in good faith, warrants that he is free from certain diseases, his good faith makes the policy valid, even though it later develops that he actually had the disease in question at the time the warranty was made.[6] It cannot be supposed in such cases that the insurance company intended to make the validity of the policy depend on the non-existence in fact of a disease of which the insured is entirely ignorant, especially as the insured is examined by the company's physician. In such cases the answer has the qualification which is understood in common every-day speech. If a person is asked the question whether he has a certain disease it is always understood that the answer is as to his knowledge. How could he answer otherwise, and why should the answer in an application for a policy of insurance be interpreted differently? It would appear that a possible analogy may be drawn between such cases and the situation presented in the principal case. The decision there seems to work injustice to the insured. The good faith of the employer should be sufficient to relieve him from the result of the untruth of his statements, made in ignorance of matters concerning which at best he could have but an imperfect knowledge, for under modern business methods it frequently requires weeks of search by an expert before a defalcation can be discovered. It is probable that the defense asserted in the principal case could be successfully interposed

[2] Roberts v. The Aetna Ins. Co. (1881), 58 Cal. 83; Cogswell v. Chubb (1896), 1 App. Div. 93, 36 N. Y. Supp. 1076; Gluting v. Metropolitan Life Ins. Co. (1888), 50 N. J. L. 287, 13 Atl. 4.

[3] Fisher v. Crescent Ins. Co. (1887), 33 Fed. 544; Schwarzbach v. Ohio Valley Protective Union (1885), 25 W. Va. 622, 52 Am. Rep. 227.

[4] Guthrie Natl. Bank v. Fidelity & Deposit Co. of Maryland (1904), 14 Okl. 636, 79 Pac. 102; Moulor v. American Life Ins. Co. (1884), 111 U. S. 335, 28 L. Ed. 447, 4 Sup. Ct. Rep. 466.

[5] Clemans v. Superior Assembly Royal Society of Good Fellows (1892), 131 N. Y. 485, 30 N. E. 496; Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. of N. Y. (1902), 115 Fed. 77.

[6] Fidelity Mut. Life Assoc. v. Jeffords (1901), 107 Fed. 402.

Digitized by Google

to one-half of the losses on fidelity bonds. The Supreme Court of the United States, one of the strictest when it comes to enforcing warranties in insurance law, permitted a plaintiff to recover on a policy because he had qualified his application by the words "the above is as near correct as I remember".[7] It is recommended that all applicants for insurance qualify their answers in the same way. The language may be open to the criticism of grammarians, but the Supreme Court of the United States has approved its legal effect. Unless the applications can be thus qualified the state must step in and standardize all forms of insurance policies to prevent their avoidance by the application of the technical doctrines of warranties to matters of which the assured can have but slight knowledge.

A. H. C.

JUVENILE COURT LAW: DETENTION OF MINOR FOR INVESTIGATION.—Under the Juvenile Court Law of the State of Washington,[1] like that of California,[2] a minor suspected of delinquency cannot be detained unless a complaint is made and a summons issued. In the case of *Weber v. Doust et al.*,[3] the defendants, who were police officers of the city of Spokane, were held liable on a charge of false imprisonment, and judgment was entered against them in the sum of $1250 for having kept the plaintiff in a juvenile detention home without a warrant or her consent, for forty-eight hours while investigating her home conditions, which they had reason to believe were morally bad.

In point of law the case is undoubtedly sound.[4] But, as no great pecuniary loss was shown, the amount of damages must be conceded to be excessive and not justifiable unless on the ground that the plaintiff was being held for the real purpose of securing evidence bearing upon a murder which the police were investigating.

The case suggests the possible expediency of drafting our Juvenile Court Laws so as to allow public officers to detain suspected delinquents, for a limited period, for purposes of investigation without a warrant. Constitutionally it seems that this would be possible, for the proceedings are equitable and not criminal in nature.[5] While this power might be subject to abuse, the

---

[7] Aetna Life Ins. Co. v. France (1876), 94 U. S. 561, 24 L. Ed. 287.

[1] Rem. & Bal. Code, § 1991.

[2] 1913 Stats. Cal. 1288.

[3] (Wash., Sept. 22, 1914), 143 Pac. 148.

[4] Wash. Const., art i, § 3; Rem. & Bal. Code, § 1991.

[5] Ex parte Powell (1912), 6 Okl. Cr. 495, 120 Pac. 1022; In re Watson (1911), 157 N. C. 340, 72 S. E. 1049; Ex parte Ah Peen (1876), 51 Cal. 280; Reynolds v. Howe (1884), 51 Conn. 472; In re Sharp (1908), 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; State v. Marmouget (1903), 111 La. 225, 35 So. 529; Mill v. Brown (1907), 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935; Lindsay v. Lindsay (1913), 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914 A, 1222; In re Mason (1892), 3 Wash. 609, 28 Pac. 1025.

Digitized by Google

extension might be desirable as affording a means for securing to the child the ultimate good for which such laws are designed[6] without any of the attendant harm or disgrace involved in formal proceedings. Yet the well founded jealousy which guards the sacred precincts of the family against encroachments by the state, renders such an extension highly improbable.

J. B. O.

LAST CLEAR CHANCE: CONTINUING NEGLIGENCE.—Liability for a negligent act exists when and only when, it is the proximate cause of the injury. *Causa proxima, non remota spectatur.* On this principle hangs the whole law of negligence. If negligence of the person injured contributes directly to the effect, this intervenes and breaks the causal connection and the doctrine of contributory negligence, first announced in Butterfield v. Forrester,[1] prevents a recovery. The law will not measure out responsibility in halves, but holds the person liable who is the main cause of the injury. For a time, this doctrine of contributory negligence effected a just settlement in all cases in which the plaintiff was negligent, but before long an entirely new situation was presented in the famous case of Davies v. Mann,[2] where the historic donkey with his fore-feet fettered, turned loose in the road by its thoughtless and negligent master, was run over by an equally negligent driver. The master was allowed to recover on the basis of a new doctrine formulated by the court, which has since been denominated the "last clear chance". This doctrine implies that the negligence of the injured party has ceased.[3] Negligence has not ceased, in the sense that prudent conduct has taken its place, but it has ceased as the active proximate cause, and has become remote, since in the progress of events a subsequent negligence of the defendant interrupts the sequence and becomes the direct cause of the injury. This intervening negligence of the defendant is the failure, after a discovery of the plaintiff's peril, to use reasonable means to prevent an injury. If the initial negligence of the plaintiff could be invoked to defeat a recovery, notwithstanding the subsequent negligence of the defendant, which has become the proximate cause, the fundamental principle of the law of negligent liability, viz. proximate cause, would be denied effect.[4] The doctrine, then, is

---

[6] Rem. & Bal. Code, § 2001; 1913 Stats. Cal. 1303; Mill v. Brown (1907), 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935; Wisconsin Industrial School v. Clark Co. (1899), 103 Wis. 651, 79 N. W. 422; Ex parte Nichols (1896), 110 Cal. 651, 43 Pac. 9; McLean Co. v. Humphreys (1882), 104 Ill. 378; Prescott v. State (1869), 19 Ohio St. 184, 2 Am. Rep. 388.

[1] (1809), 11 East 60, 103 Eng. Repr. 926.

[2] (1842), 10 M. & W. 545.

[3] Nehring v. Connecticut Co. (1912), 86 Conn. 109, 84 Atl. 301.

[4] Louisville & N. R. Co. v. Young (1907), 153 Ala. 232, 45 So. 238; Gilbert v. Erie Ry. Co. (1899), 97 Fed. 747; Rider v. Syracuse Rapid Transit Co. (1902), 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Ruppel v. United R. R. of S. F. (1909), 10 Cal. App. 319, 101 Pac. 803.

Digitized by Google

no exception to the rule of contributory negligence, but a logical outgrowth of the fundamental principle of the law of negligence. It is often referred to as the "humanitarian" doctrine,[5] because it forgives the initial negligence of the plaintiff, in placing himself or his property in a dangerous position.

If, however, the plaintiff's negligence continues to the instant of the accident, the last clear chance doctrine has no application. Except where a duty of lookout exists, the doctrine rests upon the necessary element of discovered peril. As there can be no knowledge or discovery of peril when the plaintiff has it in his power to avoid the accident up to the very instant of the catastrophe, and is fully aware of his danger, the defendant has no last clear chance. In such a case no supervening negligence of the defendant, subsequent to that of the plaintiff, relegates the plaintiff's negligence to a remote cause. The plaintiff's negligence never loses its contributory character. The varying circumstances to which these principles are applied may be illustrated by the following situations. (1). The plaintiff carelessly goes upon a railway track, not seeing a distant but on-coming train; by a misstep his foot is caught between the rails and he is thrown helpless on the roadbed. The train operator, although he sees his peril, fails to use reasonable means to prevent a fatal result. The engineer in failing to obey the humanitarian duty, introduces a new element into the case and renders the plaintiff's negligence a remote cause. (2). This situation is not infrequently slightly modified in that, instead of being unable to extricate himself from his perilous position, he could step off the track and thus escape all danger. But he is unconscious and oblivious of his peril, and it is apparent to the defendant that he will not avail himself of the means of escape open to him. Even here the want of due care on the part of the plaintiff will be regarded as the remote and not the proximate cause.[6] (3). But suppose the plaintiff is not merely passive, before the approaching train, permitting an already fixed condition to remain unchanged, but actively contributes to his injury by negligent acts of his own volition. He sees the train but attempts to cross the track, supposing that this is possible before the train passes. As a result of this error in judgment, he is killed. In this instance the negligence of the plaintiff has continued to the very instant of the catastrophe, as the proximate cause of the injury, and the doctrine of last clear chance has no application.[7] (4). Carrying the illustration still further: assume

[5] Feeney v. Wabash Ry. Co. (1907), 123 Mo. App. 420, 99 S. W. 477; Matz v. Mo. Pac. Ry. (1909), 217 Mo. App. 275, 117 S. W. 584.

[6] Himmelwright v. Baker (1910), 84 Kan. 569, 109 Pac. 178; Quinley v. Springfield Traction Co. (Mo., 1914), 165 S. W. 346; Smith v. Wabash Ry. Co. (1908), 129 Mo. App. 413, 107 S. W. 22.

[7] St. Louis etc. Ry. Co. v. Schumacher (1894), 152 U. S. 77, 38 L. Ed. 361, 14 Sup. Ct. Rep. 479; Illinois Central Ry. Co. v. Ackerman (1906), 144 Fed. 959; Denver City Tramway Co. v. Cobb (1908), 164

Digitized by Google

the same facts as in (1), except that the plaintiff attempts to cross the tracks at a public crossing and furthermore that although the engineer does not see his dangerous condition, he would have seen him, if he had exercised reasonable care in keeping a lookout. The logical and humane rule will charge the defendant with constructive knowledge of the plaintiff's peril.[8] Clearly, the breach of duty is subsequent to the plaintiff's negligence and becomes the proximate cause of the injury.

In *Townsend v. Butterfield*,[9] decided by the California Supreme Court, the court affirmed an instruction based on the last clear chance doctrine. The words of the lower court were: "The party who has the last clear opportunity of avoiding the accident notwithstanding the negligence of his opponent is considered solely responsible for it." The statement has the advantage of being short, but brevity in this instance is destructive to a fair statement of the rights of the parties. It could hardly be affirmed that the court in these few words called the attention of the jury to the most important elements of this doctrine, which have just been reviewed.

L. C.

LICENSES: EXEMPTION OF PUBLIC SERVICE COMPANIES FROM ALL FORMS OF LICENSES: SEPARATION OF STATE AND LOCAL TAXATION.—The extent of the amendment to the Constitution of California, providing for the separation of the sources of state and local taxation, has been again adjudicated by the Supreme Court of the state, this time through three decisions. In *Pacific Gas and Electric Company v. Roberts*,[1] it was determined by the court that the provision of the amendment, which declares that the gross income or revenue tax "shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property . . . . of such companies"[2] has the effect of exempting these companies from the payment of the motor vehicle licenses, imposed by the

---

Fed. 41; Terre Haute I. & E. Traction Co. v. Latham (Ind., 1913), 101 N. E. 746; Green v. Los Angeles Ry. Co. (1904), 143 Cal. 31, 76 Pac. 719; Matteson v. S. P. Co. (1907), 6 Cal. App. 318, 92 Pac. 101.

[8] Everett v. St. Louis & S. F. Ry. Co. (1908), 214 Mo. 54, 112 S. W. 486; Louisville Ry. Co. v. Mitchell (1910), 138 Ky. 190, 127 S. W. 770; Nicol v. Oregon-Wash. R. & N Co. (1912), 71 Wash. 409, 128 Pac. 628; Fearons v. Kansas City Elevated Ry. Co. (1904), 180 Mo. 208, 79 S. W. 394; Bullock v. Wilmington & W. R. Co. (1890), 105 N. C. 180, 10 S. E. 988. Bourrett v. Chicago & N. W. Ry. Co. (Iowa, 1909), 121 N. W. 380, contains a full discussion. There are a number of cases which fail to recognize that in cases where a duty to keep a lookout exists, defendant will be charged with constructive knowledge. San Antonio Traction Co. v. Kelleker (1908), 48 Tex. Civ. App. 421, 107 S. W. 64; Dyerson v. Union Pac. Ry. Co. (1906), 74 Kan. 528, 87 Pac. 680; Thompson v. Los Angeles etc. Ry. Co. (1913), 165 Cal. 748, 134 Pac. 709.

[9] (Oct. 5, 1914), 48 Cal. Dec. 377, 143 Pac. 760.

[1] (Oct. 1, 1914), 48 Cal. Dec. 272, 143 Pac. 700.

[2] Cal. Const., Art. xiii, § 14.

Digitized by Google

state,[3] on vehicles used exclusively in their business. In *Southern Trust Company v. City of Los Angeles,*[4] it was declared that banking corporations are equally exempted from paying any local or state licenses, particularly for the right to conduct a banking business in a municipality. Finally, in *Hughes v. City of Los Angeles,*[5] it was held that the exemption extends even to the protection of the agents of insurance companies, for to charge an agent a license for the privilege of soliciting business is to impose the charge upon the principal. These decisions, taken in connection with two other decisions rendered within almost the last year upon the same question,[6] seem to determine the construction which must be put upon the phrase over which these cases have all arisen—that unscientific phrase "licenses upon the property". Some of the difficulties involved in the construction of this provision have been commented upon in a previous comment.[7] The fact that the court has found it necessary to consider this very clause again and again with the same arguments to overcome, suggests, in part, the confusion it has caused. However, as the matter now stands, the law is apparently settled to the effect that railway companies, insurance companies, gas and electric companies, banking companies, telephone and telegraph companies, and those other quasi-public service companies enumerated by the constitution, are subjected to no form of taxation, either upon their property or their agents, whether it be in the form of an excise or ad valorem tax, save that of the gross revenue percentage tax.

If we are to observe the letter of the law, it would seem that this exemption would also apply with equal force to licenses passed solely in the exercise of the police power.[8] The emphatic language in the first of the principal cases above mentioned, that the words "*all* licenses" (the italics are the court's) must be given meaning to avoid "an utter breakdown in our written language", seems to strengthen this contention. Granting that this is correct, and it would follow that these companies in question would pay no local dog licenses for watch-dogs used in the protection of their buildings, nor peddler licenses for the soliciting of trade, nor licenses for the display of advertising on bill-boards and in street cars, nor for the right to run a hotel for the benefit of employees with a bar room in connection, nor any other licenses passed for regulative purposes, providing that such charges were found to relate or fall upon

---

[3] 1913 Stats. Cal. 639.

[4] (Dec. 11, 1914), 48 Cal. Dec. 530, 145 Pac. 94.

[5] (Dec. 11, 1914), 48 Cal. Dec. 537, 145 Pac. 94.

[6] San Francisco v. Pacific Tel. and Tel. Co. (1913), 166 Cal. 244, 135 Pac. 971; Hartford Fire Ins. Co. v. Jordan (Jan. 17, 1914), 47 Cal. Dec. 175; and on rehearing, Hartford Fire Ins. Co. v. Jordan (July 28, 1914), 48 Cal. Dec. 145, 142 Pac. 839.

[7] (May, 1914), 2 Cal. Law Rev. 322.

[8] (May, 1914), 2 Cal. Law Rev. 322; Rapp & Son v. Kiel (1911), 159 Cal. 702, 115 Pac. 651.

Digitized by Google

"property, or any part thereof, used exclusively in the operation of their business in this state".[9] However, it is to be noted that the courts in California have uniformly distinguished local assessments, for street work, building of canals or sewers, or for other similar improvements, from taxes, on account of their peculiar nature and purpose and classified them more as a charge for benefits received.[10] Perhaps the courts will succeed, when the question arises as it soon must, in pointing out that licenses under the police power are not licenses at all and in no sense a form of taxation, but merely regulative charges or fees imposed for the protection of the public health and safety and to provide for the general welfare.[11] Considering the amendment as purely a revenue measure, concerned only with the taxation powers of the state and its various political divisions, it would not be difficult to read into the above constitutional provision some such distinction, particularly as the court has been so liberal in construing the same provision, when viewed from another angle. Such a construction is most desirable to save to the people one phase of that important and effective arm of the government known as the police power, that power, so commonly employed, of controlling and restricting dangerous and undesirable businesses by means of licenses.

M. C. B.

MINING LAW: LODES IN PLACERS: PRESUMPTION ARISING FROM LAPSE OF TIME.—May lapse of time, even in the absence of any statute of limitations, and without reference to any question of laches, constitute a sufficient defense to an action brought, or a claim initiated relying upon section 2333, Revised Statutes of the United States, if there were in fact "known lodes" at the time of the application for the placer patent? This question is answered

---

[9] Cal. Const., art. xiii, § 14. This point, too, has been recently adjudicated. For example, steamboats of a railway company not "used exclusively" in the operation of the business of the company should not be "included in the list of property whose sole and only tax is covered by the gross revenue and percentage". Lake Tahoe Railway and Transportation Co. v. Roberts (Oct. 5, 1914), 48 Cal. Dec. 381, 143 Pac. 786. A fortiori, railroad companies must pay, at least, such revenue licenses as are required by local authorities for the right to exhibit advertising cards, to conduct restaurants, news stands, cigar stands and the like in their stations. But quaere, when this right is sold to another, to what extent, if any, should the income thus realized in the nature of rentals be included in the gross revenue which is taxable solely under the constitution and which must arise from property used exclusively in the company's business?

[10] Holley v. County of Orange (1895), 106 Cal. 420, 39 Pac. 790; Taylor v. Palmer et al. (1866), 31 Cal. 240; Bauman v. Ross (1896), 167 U. S. 549, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966.

[11] See Cooley on Taxation, 3rd ed., p. 1133 ff.; State ex rel Toi v. French (1895), 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; Johnson v. City of Great Falls et al. (1909), 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974; Commonwealth v. Boyd (1905), 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464.

Digitized by Google

in the negative in the case of *Barnard Realty Company v. Nolan*,[1] by way of dictum. This was an action brought to quiet title to a placer claim. The defendant, forty-one years after the granting of the placer patent, located twelve lode claims on the land conveyed by the placer patent and sets up as a defense that "known lodes" existed on this land at the time the placer patent was applied for. The court found for the plaintiff and held that the evidence produced by the defendant was insufficient to support that claim. After rendering this decision the court continues: "Adverting to the contention of plaintiff heretofore made that it should be given the benefit of limitations applicable to suits to vacate patents, with reluctance the court denies it. . . . the settled course of decision by the Supreme Court of the United States is that patents like unto this, though prima facie conveying all lands within the placer boundaries therein described and for all of which the patentee paid, convey no title, defeasible or otherwise, to lodes known to exist when the patent is applied for; that such lodes, though unidentified and undefined, are excepted and excluded from the patent, title to them remains in the United States, and at any time thereafter they may be, and by strangers to the patent, possessed, located, and patented even as any other lode upon public lands."

" . . . if a suit like this determines the lodes were not 'known lodes' when the patent was applied for, the patentee is not thereby confirmed in his title, for the decree is not res judicata in respect to the United States and persons not parties; and such persons can relocate the lodes and relitigate the issue, again and again, ad infinitum."

The court recognizes that this is out of line with the general rule of the authorities as applied to mineral patents but says, as already quoted that this has been the settled rule of the Supreme Court in this class of cases, but it refrains from citing any authorities to support its view. And no authorities have been found which have dealt directly with this question.

This being a suit in equity equitable principles must be applied. In view of such it seems that the doctrine laid down by the court is open to criticism. It was said in Barden v. Northern Pacific Railroad Company,[2] it is "of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public". And to prevent this ever-recurring litigation the courts have worked out the doctrine that lapse of time will ripen an inchoate prima facie title into a complete indisputable title. Thus Mr. Story says: "A defense peculiar to Courts of Equity is that founded upon the mere lapse of time

[1] (July 25, 1914), 215 Fed. 996.
[2] (1893), 154 U. S. 288, at p. 326, 14 Sup. Ct. Rep. 1030, 38 L. Ed. 992.

Digitized by Google

and the staleness of the claim in cases where no statute of limitations directly governs the case. In such cases Courts of Equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging for the peace of society antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the asserting of adverse rights."[3]

The leading case on the question of lapse of time as creating a bar to a cause of action is United States v. Beebee.[4] This was an action brought by the government to cancel a patent on the ground of fraud, and the action was brought forty years after the patent had been granted. The court said: "[It is] a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. . . . When the lapse of time has been so great as to afford a reasonable presumption that the witnesses are dead, and the proofs lost or destroyed, a court of equity will refuse to undertake the task of ascertaining the facts and affording a remedy; and this, not because of any statutory limitation, or because of laches merely, but upon grounds of public policy and for the peace of society."

There are many other cases which support this view.[5] In most of these cases the lapse of time was only a comparatively few years, ten to thirty years, while in the case at hand it had been forty-one years.

It is recognized that the statute makes a direct statement that "known lodes" shall be excepted from the grant and remain open to relocation, but notwithstanding, on equitable grounds the holder of the placer patent should after a long period of possession become secure in his title and free from continual litigation. As is further said in United States v. Beebee,[6] "It is well settled that possession of land for a long period of time will raise a presumption of a grant which will be enforced as against the government . . . and if a grant is to be presumed by reason of the lapse of time, when there is no other evidence of a grant except that afforded by long possession, it would seem that, upon similar grounds, the validity of a grant which is shown to have been actually executed, and under which possession has been held for an equally long period of time, should be presumed".

W. J. A.

---

[3] Story's Equity Jurisprudence, 13th ed., § 1520.

[4] (1883), 17 Fed. 36, 4 McCrary 12; Affirmed (1887), 127 U. S. 338, 8 Sup. Ct. Rep. 1083, 32 L. Ed. 121.

[5] Boone v. Chiles (1836), 10 Pet. 177, 248, 9 L. Ed. 388; Brown v. County of Buena Vista (1877), 95 U. S. 157, 161, 24 L. Ed. 352; Burke v. Southern Pacific R. R. Co. (June 22, 1914), 234 U. S. 669, 34 Sup. Ct. Rep. 907; Maxwell v. Kennedy (1850), 8 Howard 210, 12 L. Ed. 1051; Sullivan v. Portland etc. R. P. Co. (1876), 94 U. S. 806, 811, 24 L. Ed. 324.

[6] (1883), 17 Fed. 36, at p. 39.

Digitized by Google

PUBLIC SERVICE COMPANIES: LIMITATION OF LIABILITY IN CASE OF NEGLIGENCE.—That a common carrier may not stipulate for exemption from responsibility for the loss of goods due to negligence is now accepted with practical unanimity by the courts.[1] Public policy lies at the base of this rule.[2] To use the language of the court in the case of Railroad Company v. Lockwood,[3] "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community." Again, "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains." That this reasoning when applied to total exemption from liability for negligence is sound has rarely been questioned.

In *Zetler v. Tonopah and Goldfield Railroad Company,*[4] the majority of the court declared void, with reference to negligence, the following stipulation in the passenger's ticket: "It is agreed that the value of the baggage transported under this ticket shall not exceed $100", on the ground that a common carrier cannot contract to limit his liability in the event of negligence. If this stipulation be regarded as a partial exemption from liability for the consequence of the carrier's negligence it should be held void. For it appears "illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-nine hundredths of the loss so occasioned."[5] If the doctrine of partial exemption were carried out to its logical conclusion, what is there to prevent the carrier from going one step further and stipulating for total exemption? Surely not any distinction on principle but merely one in degree. And the fact that such partial exemption is in consideration of reduced rates of freight does not render that lawful and valid which other-

---

[1] Railroad Co. v. Lockwood (1873), 84 U. S. 357, 21 L. Ed. 627; also see collection of authorities in Hutchinson on Carriers, 3rd ed., vol. 1, note 24 to § 450; Moore on Carriers, 2nd ed., p. 453, § 16 and note 32 thereto.

[2] 2 Kent's Commentaries 597, Levering v. Union Transportation and Ins. Co. (1867), 42 Mo. 88, 97 Am. Dec. 320; Bank of Kentucky v. Adams Express Co. (1876), 93 U. S. 174, 23 L. Ed. 872.

[3] (1873), 84 U. S. 357, 21 L. Ed. 627.

[4] (Nev., Sept. 5, 1914), 143 Pac. 119, affirming Zetler v. Tonopah and Goldfield R. R. Co. (1913), 35 Nev. 384, 129 Pac. 299.

[5] Louisville and N. R. Co. v. Wynn (1890), 88 Tenn. 320, 14 S. W. 311.

Digitized by Google

wise would be unlawful and invalid.[6] The same principles of public policy, namely, the inequality of the parties and the necessity of the utmost care on the part of the carrier, operate to divest the transaction of validity in the one case as in the other.

Is there, then, any ground on which such an agreement as that considered in the principal case can be upheld? In the leading case of Hart v. Pennsylvania Railroad Company,[7] the United States Supreme Court had before it a practically identical state of facts. Nevertheless the stipulation was held valid, the court giving as the distinct ground of its decision that "where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in the case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations". From the foregoing it is apparent that a carrier may lawfully establish a scale of charges applicable to a specific commodity if graduated reasonably according to the varying value of that commodity. But where the specified amount or "the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss."[8] Where, however, as in the Zetler case,[9] the shipper has notice that he must declare and pay for any excess value beyond a certain sum, if he fails so to declare he is thereafter estopped[10] from saying that the value of the goods is greater, provided the carrier has no knowledge of the greater value.[11] The California court[12] intimates that knowledge

---

[6] Kansas City Southern Ry. Co. v. Carl (1913), 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. Rep. 391; Alabama Great Southern R. R. Co. v. Little (1882), 71 Ala. 611.

[7] (1884), 112 U. S. 331, at p. 343, 28 L. Ed. 717, 5 Sup. Ct. Rep. 151.

[8] Hutchinson on Carriers, 3rd ed., vol. 1, § 427.

[9] (Nev. Sept. 5, 1914), 143 Pac. 119.

[10] Estoppel was the ground of decision in the Hart case at p. 341; in the Croninger case, infra note 18, at p. 510; In Missouri etc. Ry. Co. v. Harriman, infra note 18, at p. 668.

[11] 21 Harvard Law Rev. 32, at pp. 44, 45. Also compare the statement in the Hart case at p. 340: " . . . the agreement as to value . . . stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

[12] Donlon Bros. v. Southern Pacific Co. (1907), 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811. Blackwell v. Southern Pacific Co. (1910),

Digitized by Google

on the part of the shipper as to the true value of the goods is immaterial. But if estoppel be the foundation of the doctrine of "agreed valuation" by what process of ratiocination can the shipper be estopped to set up the true value of the goods when he has not misled the carrier with reference thereto? Therefore, two things would seem necessary for the "agreed valuation" to be valid: such valuation must reasonably approach the normal value of the commodity in question, and if the true value be greater, the carrier must be ignorant of this true value.

The majority opinion in the Zetler case[13] entirely ignores the principle involved in Hart v. Pennsylvania Railroad[14] and the long line of decisions following it.[15] Although there is a conflict of authority,[16] a majority of jurisdictions hold in accordance with the Hart case and consequently in opposition to the Nevada court. That the prevailing rule represents the sounder view seems to follow from the United States Supreme Court's presentation of the case. "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. . . . The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."[17]

So much then for the case as it should stand on basic principle. But the Nevada court erred in still another respect. The question

---

184 Fed. 489, was a case which arose in a Federal Circuit Court of California; the court there stated that it felt itself bound by the state decisions on the subject and in referring to Donlon Bros. v. Southern Pacific Co. stated that "the question of the carrier's knowledge of the real value of the goods, where the contract is otherwise fair, is regarded by the Supreme Court [of California] as a wholly immaterial factor." This language shows that the construction put upon the somewhat equivocal language in the Donlon case is not unwarrantable.

[13] (Nev, Sept. 5, 1914), 143 Pac. 119.

[14] (1884), 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. Rep. 151.

[15] See collection of authorities in the Interstate Commerce Reports (1908), vol. 13, at p. 559; also see cases cited in Hutchinson on Carriers, 3rd ed., vol. 1, in note 42 to § 426; Moore on Carriers, 2nd ed., pp. 490-516, especially note 69 to p. 491, and note 70 to p. 494.

[16] See collection of authorities in the Hart case at p. 342.

[17] Hart v. Penn. R. R. Co. (1884), 112 U. S. 331, 28 L. Ed. 717, 5

Digitized by Google

was one of interstate transportation and the United States Supreme Court in a long line of decisions, exemplified in the leading case of Adams Express Company v. Croninger,[18] held that the provisions of section twenty of the Carmack Amendment, regulating liability of interstate carriers, had superseded all state regulations and decisions on the subject. The most recent case on the subject is Boston and Maine Railroad v. Hooker,[19] arising from facts substantially identical with those involved in the principal case. It would seem, therefore, that the United States Supreme Court's view in this, its latest utterance, adopting the reasoning of the Hart case *in toto,* should have been conclusive on the Nevada court.

J. C. A.

STATUTORY CONSTRUCTION: VALIDITY OF LOAN WHERE LENDER FAILS TO GIVE THE LOAN TICKET REQUIRED BY STATUTE.—In *Wood v. Krepps,*[1] a personal property broker sued to foreclose a chattel mortgage. The defendant claimed that the contract was invalid since the lender had failed to give the loan ticket required by statute from all persons in the business of loaning money on chattel mortgages, salary assignments or similar security, but the court held that the contract was valid, though the lender was liable to the penalty imposed by the statute, as well as a penalty for failure to pay a municipal license. It is a general rule that contracts are void if one of the parties fails to perform some statutory duty imposed upon him, though only a penalty is prescribed for violation of the statute, where it is passed to regulate a business for the public protection,[2] though not where a penalty is imposed to secure the collection of a purely revenue tax or license.[3] The municipal license was held to be purely a revenue measure in the principal case. The loan ticket requirement of the statute was said to be collateral to the contract and failure to give it merely subjected the lender to the fine provided in the act. Although this was the only penalty provided for failure to give

---

Sup. Ct. Rep. 151; also see Moore on Carriers, 2nd ed., p. 1912, § 3, and notes thereto.

[18] (1913), 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148; followed in Wells Fargo & Co. v. Neiman-Marcus Co. (1913), 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. Rep. 267; Missouri, etc. Ry. Co. v. Harriman (1913), 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. Rep. 397; Kansas City Southern Ry. Co. v. Carl (1913), 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. Rep. 391.

[19] (April 6, 1914), 233 U. S. 97, 34 Sup. Ct. Rep. 526.

[1] (Oct. 1, 1914), 48 Cal. Dec. 233, 143 Pac. 691.

[2] Cope v. Rowlands (1836), 2 Mees. & Wels. 149; Shattuck v. Watson (1910), 164 Mich. 167, 129 N. W. 196; E. A. Strout Co. v. Howell (Del., 1913), 85 Atl. 666. The English courts apply this rule very strictly under the Money-Lenders Act (63 & 64 Vict., c. 51). See Victorian Daylesford Syndicate v. Dott, [1905] 2 Ch. 624; In re Robinson, [1910] 2 Ch. 571, [1911] 1 Ch. 230.

[3] Vermont Loan & Trust Co. v. Hoffman (1897), 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509; Sunflower Lumber Co. v. Turner Supply Co. (1909), 158 Ala. 191, 48 So. 510.

Digitized by Google

the loan ticket, while it was expressly declared that contracts were invalid if more than the legal rate of interest was charged, still the statute is to be construed as a whole,[4] and furthermore all circumstances leading up to the passage of the act, the evil existing, the remedy desired, and all other factors going to show the legislative intention can be properly taken into account in construing the statute.[5] There has been a great deal of agitation against "loan sharks" in recent years and a number of statutes have been passed regulating the business of "personal property brokers", as well as pawnbrokers, to prevent the exploitation of the needy and improvident by these persons. Such statutes have been upheld, where general in their terms, as proper police measures.[6] The act of 1909, as amended in 1911, was upheld in Eaker v. Bryant,[7] on the ground that the legislature had grounds for believing that these persons were guilty of abuses not found among other professional money lenders, or among persons making occasional loans on even this class of securities. The classification made was held to be reasonable, and the law applying equally to all persons concerned, it was said to be no violation of any constitutional right. The court considered that the legislature intended to place these persons on the same basis as pawnbrokers, who have been subject to regulation for a long time. It has been held in this state that a pawnbroker's contracts are void if he fails to comply with the laws and ordinances regulating his business.[8] In view of these facts would not the court have been justified in construing the act of 1909 to render void all contracts made without complying with its provisions? The courts are always reluctant to adopt a construction which would impose a forfeiture but it would seem that this would be the most efficient way to prevent evasion of such an act as this.

J. S. M., Jr.

WILLS: DEED OF TRUST OR TESTAMENTARY INSTRUMENT.—For a man to eat his cake and have it too, has always seemed to be a feat impossible of accomplishment. But that a person can bring this about if he only take care that the cake be properly labeled seems to be the view taken by the California Supreme

---

[4] Sutherland, Statutory Construction, § 240.

[5] Sutherland, Statutory Construction, § 292; Holy Trinity Church v. United States (1892), 143 U. S. 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511.

[6] Sanning v. Cincinnati (1909), 81 Ohio St. 142, 90 N. E. 125, 25 L. R. A. (N. S.) 686. See Norris v. City of Lincoln (1913), 93 Neb. 658, 142 N. W. 114, Ann. Cas., 1914B, 1194, as to validity of license taxes on money lenders taking chattel mortgage security.

[7] (Feb. 25, 1914), 18 Cal. App. Dec. 318, 140 Pac. 310. The decision in this case was followed by the District Court of Appeal in Ex parte Stephan (Nov. 19, 1914), now pending before the Supreme Court on petition for habeas corpus.

[8] Levinson v. Boas (1907), 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, n.

Digitized by Google

Court in a case[1] formerly noted in this Review.[2] There, a grant of certain real property, subject to the exceptions and reservations mentioned in the opening clause of the deed, was held to be a deed passing an interest *in praesenti* and not a testamentary instrument. The reservations included the exclusive possession and use in the grantor's own right of the income from the lots conveyed during the life of the grantor, the right to revoke the deed, and the right to sell any of the property. The provision in the instrument that the revocation should, if made, be in writing, duly acknowledged and recorded, evidently added much weight to the argument which caused the court in bank to reverse the department decision on rehearing. In answer to the objection that under the English common law there could be no power of revocation reserved in a deed, the court called attention to the changed conditions under which land is transferred at the present time. With the introduction of the system of recording instruments, the name of the owner of the land is now much more accessible than it was formerly, and if a power of revocation has been reserved in a deed, it will appear on the records. The test as to what an instrument is, was brought out in the quotation from Nichols v. Emery[3] to the effect that the fact of the passing of a present interest makes the instrument a deed, while in order that it be a will, it must operate only upon and by reason of the death of the maker.

However, that all the advantages which a will gives in the disposition of one's property at the time of death do not accompany the method of disposition by deed is seen from the decision of *Niccolls et al. v. Niccolls et al.*[4] where an attempt to dispose of all the "property of every kind and nature, both real and personal, that we may have and own at the time of the death of the said Robert Niccolls", by transferring it, thus described, to trustees, was held to be invalid as a conveyance in trust. The chief objection urged was that from the wording it appeared that the property was to pass only at the time of the death of the trustor, Robert Niccolls. That this objection alone should not have vitiated the deed may be seen from a case in Vermont,[5] where words much more resounding in their testamentary tone, viz: "the [grantees] are not to have any right or title whatever to the above described premises as long as we or either of us live; and the above deed is not to be binding upon us or either of us if in any case we should want or need to sell a part or all of said real estate in order to maintain us, and the above deed is to be null

---

[1] Tennant v. John Tennant Memorial Home (April 1, 1914), 167 Cal. 570, 140 Pac. 242.

[2] Tennant v. John Tennant Memorial Home (1912), 44 Cal. Dec. 690. See comment, 1 Cal. Law Rev. 275.

[3] (1895), 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43.

[4] (Oct. 2, 1914), 48 Cal. Dec. 287, 143 Pac. 712.

[5] Blanchard v. Morey (1883), 56 Vt. 170.

Digitized by Google

and void in such case and we are to have the entire control of the above premises during our natural lives", were held not inconsistent with a good grant *in praesenti*, retaining a reservation of a right of revocation and sale, and a life estate to the grantors. Suppose, in the principal case the wording had been all our "property of every kind and nature, both real and personal, *that we now have, and* that we may have and own at the time of the death of the said Robert Niccolls." What, in effect, would have been the difference between such a grant and that made in the Tennant case, including in the deed the reservations stated above? The objection that no present interest passed would then be answered. As to the matter of indefiniteness of description, it has been held in California that the words, "all lands and real estate belonging to the said party of the first part wherever the same may be situated"[6] are sufficient to pass real property. But would the court allow after-acquired title to property described in such a vague manner to pass by deed on the theory of estoppel by deed?[7] Apparently not, because there would be no subject matter to which the interest of the grantee could attach, since the property had neither been described nor located by the grantor. Consequently it seems that real estate can be disposed of by deed or trust deed, and a life interest in the grantor as well as the power to revoke the grant and sell the property reserved, only if the property be specifically described.

G. H. G.

---

[6] Pettigrew v. Dobbelaar (1883), 63 Cal. 396
[7] Cal. Civ. Code, § 1106.

Digitized by Google

Book Reviews

BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA. By John Bouvier. Third Revision (being the eighth edition) by Francis Rawle. West Publishing Co., 52-58 W. 3rd St., St. Paul, Minn. 1914. pp. xix, 3504. 3 vol. $19.50.

This new edition of Bouvier's Law Dictionary, the Third Revision by Mr. Rawle, is deserving of the warmest commendation. It is not only an indispensable adjunct to every lawyer's library, but a serviceable and efficient tool. It is the case of a book which has been improved by each new edition, from the first in 1839 to the eighth in 1914. Mr. Rawle has edited the editions of 1883, 1897, and 1914, and has given in each instance a new and more comprehensive character to the work. Nothing seems to have been omitted to make the dictionary side proper, accurate and scholarly. The valuable researches of modern scholars into the history and science of the law have been availed of, whether such investigations have been published in books, monographs, or articles in legal periodicals. The volumes thus become a reliable source of reference for the student, scholar, and lawyer.

On the other side of the work, the cyclopedic, there are numerous articles, each in itself a concise monograph on the subject treated. Of such articles, selecting at random, are Attorney, Automobiles, Aviation, Certiorari, Distress, Due Process of Law, Employers' Liability Acts, Growing Crops, Handwriting, Jurisdiction, Juvenile Courts, Monroe Doctrine, Precedents, Recoupment, Workmen's Compensation Acts. These articles are much less in length than similar articles in avowed cyclopedias, but they give just that information which a person sometimes wants. They appear to be accurate and thorough. We should be inclined to think, however, that any larger development of this cyclopedic side would imperil the character of the work.

Years ago, when the writer was finishing his preparation for the bar examination, he read Bouvier's Law Dictionary through three times. It seemed to him to fix and intensify his knowledge of the law. This enlarged and more comprehensive edition may serve a similar purpose and give at the same time fuller and richer information.

W. C. J.

PARK'S ANNOTATED CODE OF THE STATE OF GEORGIA. VOL. I. POLITICAL CODE. Prepared by Orville A. Park. The Harrison Co., 50 East Hunter St., Atlanta, Ga. 1914. pp. xxxi, 890. $8.50.

One of the notable book events of the past year is the publication of the first volume of the 1914 Annotated Code of Georgia, a work which will require six additional volumes.

We learn from the preface that Georgia was the first English-speaking commonwealth to reduce to a statute the entire body

Digitized by Google

of law in force in the state. She was also one of the first to publish an annotated code—in 1873. As a work of this character presents at a single view the whole unwritten as well as the written law of the state, its value, not only to the practitioner, but to the student of comparative law is not to be measured if the digest and editorial parts of the work have been well done.

The digesting of decisions is not a mere matter of topical arrangement and cross references. It calls for breadth of legal knowledge and highly trained powers of analysis. While the supreme test of a book of reference is practical use, a careful comparison with the decisions of some of the annotations to the code is enough to show that this publication takes rank among the very best of its kind. A marked feature of the work also is an elaborate system of crossed catchwords and of cross references from section to section and from one note to another, so that all the notes as well as all the code sections bearing upon a particular question can be readily located.

The annotations also include the federal decisions of local bearing. The importance of this feature is apparent from the fact that the federal courts are frequently called upon to construe state statutes.

Not only do the notes to the code bear on their face prima facie evidence of underlying legal knowledge and powers of analysis, but the name of Orville A. Park on the title page conveys an assurance that the work has been done under thoroughly competent editorial supervision.

J. W.

PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH. By Richard T. Ely. The Macmillan Co., 66 Fifth Ave., N. Y. 1914. Vol. 1, pp. xlvii, 474; vol. 2, pp. 475, 995. $4.00 net.

Our economists, like our legal writers, have for the most part merely carried forward the English tradition with its powerful leaning towards extreme individualism. Professor Ely of the University of Wisconsin was one of the first among American writers upon economic subjects to draw his inspiration from continental sources. His early work in this field set forth, in the main, ideas drawn from the teachings of distinguished modern German thinkers and writers, and, in the present work, the result of many years of teaching and development of thought, he has fitted the facts of American economic life into the theories and conclusions of these masters.

The book is therefore unique. It leavens juristic thinking with the results of economic experience and speculation, it leavens economic thinking with the results of juristic experience and speculation. Economics is shown to be closely allied with law, law with economics. Before the economist can solve any of the great problems of the distribution of wealth he must have a true con-

Digitized by Google

ception of property and of contract, and it is equally important that the lawyer should be equipped with proper economic conceptions. As von Ihering says, in a passage quoted by Professor Ely, which may serve as pointing to the central idea of the present work, "It is not true that property according to its idea carries with it an absolute right of control. Property in such a form cannot be tolerated by society and never has been tolerated. The idea of property cannot carry with it anything which is contrary to the idea of society." Equally in the field of contract, it will not do to begin with an assumption that there is an absolute right to contract, when everyone who has read anything upon general jurisprudence knows that there have been systems of society where contract was practically unknown, and that our own system of contract law is the result of the labors of ingenious lawyers working out the wants and needs of advancing society.

Professor Ely is far removed from the socialistic philosophy,—on the contrary, he firmly believes in the institution of private property. He goes farther than many advanced economists in support of the theory of inheritance, though he wisely points out that it is carried to an absurd extent when relatives of a decedent, however far removed, are permitted to succeed to a decedent's estate. Nor is the author a severe critic of the courts. He does find fault with them for proceeding upon the outworn economic theory of laissez faire and the political theories of natural rights. Like Justice Holmes he does not think that those who made our constitutions intended to engrave Herbert Spencer's Social Ethics in tablets of bronze, to be worshipped like the laws of the Medes and Persians. But he has no sympathy with the judicial recall, and, like all other serious thinkers, he sees one of the greatest menaces to liberty, progress and justice in an elective judiciary. His remedies for improvement ("obvious" remedies he calls them), are these, "First, we need an adequate modern legal education, conceived not from the point of view of private practice, but from the point of view of public interests. We want schools of jurisprudence in the broadest sense. And then as judges, all disclaimers to the contrary notwithstanding, do have real and very great legislative powers, only those should be selected as judges who have an enlightened twentieth century social philosophy." The lawyer who reads these interesting volumes will find not only many valuable practical suggestions, but will also be brought in touch with much of the best in juristic thought on this and the other side of the Atlantic.

O. K. M.

BRADBURY'S WORKMEN'S COMPENSATION AND STATE INSURANCE LAW. By Harry B. Bradbury. Second edition. The Banks Law Publishing Co., 23 Park Place, N. Y. 1914. Vol. 1, pp. lxxxii, 1052cc; vol. 2, pp. 1053, 2476. $13.00.

When the author of this work undertook his task he was con-

Digitized by Google

fronted with a difficulty which rarely concerns the writer of law books. The field to be covered was not only an extensive one, but included a branch of the substantive law which was a distinct innovation upon our legal system. He was therefore unable to look to the work of former writers either for suggestions as to method or for material, nor save on a few of its phases, had he any considerable number of judicial decisions to aid him in mastering the complications of his subject. Yet in spite of these obstacles and others to which the situation necessarily gave rise, he has succeeded in producing a comprehensive and useful book. It is not a scholarly work, to be compared with the standard treatises of the law, nor is it entitled to a place in the first rank of modern text books. It is too largely a digest to be deserving of such classification. It is, however, a practical workbook, and one which must have a real value to the law maker and the practising lawyer.

The opening chapter presents an interesting summary of the steps which have led up to the now general indorsement of the view that the theory of compulsory compensation by an employer to one injured in his employ is a sound one. This discussion, coupled with a convenient arrangement which makes readily possible a detailed comparison of the several statutes at the present time in effect, provides a practical working basis for one who is engaged in the shaping of a new statute, or the construction of an amendment to a law already in force. For the lawyer, the work has its greatest attraction in its discussion of the statutes considered, its reference to decisions which have been rendered upon compensation and state insurance laws, and its chapter on procedure. This last is quite complete, and is supplemented wherever possible by such forms as have been officially prescribed or approved. Other important features of the book are its chapter on the actuarial principles underlying industrial insurance, and its publication in full of the compensation laws of Germany, England, Canada and the United States.

J. U. C., Jr.

MONTGOMERY'S MANUAL OF FEDERAL PROCEDURE. By Charles C. Montgomery. Bancroft-Whitney Co., 200 McAllister St., San Francisco, Cal. 1914. pp. viii, 1057. $6.50.

To satisfy the requirements of the legal profession, treatises are being published which vary considerably from the typical text book. Like a medical prescription a law book now requires directions for use. The author of this manual has furnished in the preface the directions. There is an outline text of the subject with a reference to the statutes, to decided cases and often to standard treatises where a more complete discussion can be obtained. The work does not profess to be a scientific exposition of principles for students, or an exhaustive encyclopedia for practitioners. It is just what it purports to be—a guide. The text of the statutes is given *verbatim*. Notwithstanding recent codification, these statutes are still pretty well scattered throughout the

Digitized by Google

laws, and their collection in one volume is of real value. A number of practice forms are given in connection with the text. The manual should be very serviceable to those who have not access to the statutes and specialized text books on the subject. For the lawyer who must rely on one book, this would seem to be the book. The work is another example of the publisher's skill in compressing a large quantity of useful matter into a single volume of pocket size with clear type.

A. M. K.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By William Miller Collier. Tenth edition by Frank B. Gilbert. Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1914. pp. lxxxi, 1513. $9.00.

Digests and encyclopedias, constantly being extended and improved, have deprived text books of a large part of their former popularity among practitioners. Nevertheless there are certain subjects in dealing with which the practicing lawyer feels the need of a comprehensive and up-to-date text. Perhaps the most striking instance of such a subject, outside of practice and procedure, is that of bankruptcy law; and the appearance of the tenth edition of Collier on Bankruptcy will therefore be welcomed.

This work has come to be recognized as one of the standard treatises on the subject. It is based on the theory, as stated by the original author, that "the law of bankruptcy is purely statutory both in its origin and in its development", and it is therefore written in the form of a commentary on the sections of the bankruptcy act. This arrangement is a help to ready reference for those familiar with the act, and yet it does unquestionably sacrifice the more logical order of treatment which has been adopted by other writers on the subject. However, the popularity of the work is shown by the fact that ten editions have been published during the sixteen years of the operation of the present bankruptcy act.

The present edition is printed on thin paper, and includes not only the official forms, but also the very useful supplementary forms which have appeared in the last few editions. The appendices contain the new equity rules established by the Supreme Court, and the full text of the bankruptcy acts of 1800, 1841, 1867, and 1898.

M. E. H.

DIGEST OF WORKMEN'S COMPENSATION AND INSURANCE LAWS IN THE UNITED STATES. Compiled by F. Robertson Jones. Workmen's Compensation Publicity Bureau, 80 Maiden Lane, New York. Dec., 1914. pp. 40. $2.00 paper, $3.00 leatherette.

This work, which is published in the form of a convenient pocket folder, amply fills the need for a concise and handy reference-digest of the several workmen's compensation and insurance laws which have been adopted within the past few years in some

Digitized by Google

twenty-four of the United States. In this digest the law of each state is analyzed under thirty-five separate heads, which cover comprehensively the essential features of the law, and whenever possible the text is supplemented by reference to the decisions of courts of appeal. By means of an ingenious device the reader is enabled at a glance to compare analogous provisions of the laws digested, and to determine whether or not a case cited under the law of a jurisdiction other than that with which he is immediately concerned will be of use to him in construing the statute of his own state.

J. U. C., Jr.

UNPOPULAR GOVERNMENT IN THE UNITED STATES. By Albert M. Kales. University of Chicago Press, 58th St. and Ellis Ave., Chicago, Ill. 1914. pp. 270. $1.50 net.

In "Unpopular Government in the United States" Professor Kales has presented a very entertaining account of some of the reasons for the "rule of the few" instead of the rule of the many. Starting out with a theory that separation of the powers of government and decentralization of powers were necessary to secure liberty, we have advanced to frequent elections of many officials as further steps toward democracy. The resulting burden upon the elector has been too great and so the choice of candidates has fallen into the hands of the professionals. To do away with the "politicrats" we must simplify and centralize government, appoint the judges and introduce the short ballot.

E. E.

JURISDICTION OF THE FEDERAL COURTS. By the late Amos M. Thayer. Revised and annotated by Byron F. Babbitt. The F. H. Thomas Law Book Co., 14 South Broadway, St. Louis, Mo. 1914. pp. xi, 268. $2.50.

This little work (only eighty-nine pages, the remainder of the book containing Court Rules and the Judicial Code of the United States) was prepared by the late Judge Thayer, of the United States Circuit Court, while lecturing on Federal Jurisdiction in the St. Louis Law School. The Judicial Code and the new Equity Rules have necessitated a new edition and this work has been prepared by Byron F. Babbitt, United States Court Commissioner for the Eastern District of Missouri.

While the book was primarily written for law students, its brevity makes it of real value to the practicing lawyer who wants to obtain quickly a general view of this technical and rather unfamiliar subject. Perhaps the first merit of the book lies in the practical suggestions that come as a result of the author's years of experience on the federal bench. Such suggestions could not have been made by the ordinary text writer, or gained from a study of decided cases. In spite of its brevity the book covers much ground. Even the rules of etiquette are not ignored, directions being given as to the proper form of address in legal cor-

Digitized by Google

respondence with the federal judiciary. The work is severely practical, possessing little of the charm of style that made the lectures of Judge Curtis a classic on the subject.

A. M. K.

BARTOLUS ON THE CONFLICT OF LAWS. Translated into English by Joseph Henry Beale. Harvard University Press, 2 University Hall, Cambridge, Mass. 1914. pp. 86. $1.00.

Professor Beale modestly disarms criticism by professing that he lacks the qualifications necessary for the translation of this work, but justifies his appearance in the role of translator by the plea that no one better qualified than he has done the work. We may well be inclined to doubt Professor Beale's appraisement of himself. The work is certainly written in excellent English and can be read with satisfaction, which is, as translations go these days, a somewhat rare virtue. It was either Cayley or De Morgan who, without knowing a word of Arabic, is said to have read an Arabic manuscript upon a mathematical subject, and so Professor Beale, even if he have "small Latin and less Greek", is better fitted than anyone in the United States by the breadth and depth of his learning upon the subject of conflict of laws to interpret the thoughts of the pioneer in this branch of law. The work was worth doing. Our own Story, whose most lasting work was in this field, is extensively indebted to Bartolus, and the student in tracing the development of the subject through Story will be glad to have access to Bartolus. The book is elegantly printed, as befits a translation celebrating the six hundredth anniversary of the Italian jurist's birth.

O. K. M.

A TREATISE ON THE LAW OF NATIONAL AND STATE BANKS. By H. W. Magee. Second edition. Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1914. pp. lvii, 1159. $7.50.

The author has further improved this useful work, which was favorably reviewed in this Review for September, 1913, by adding to it the complete text of the Federal Reserve Act. He has made the text of this Act more easily accessible by arrangement into paragraphs, with notes and cross-references. He has also made a separate index to the Act. The book is a convenient guide and book of reference.

O. K. M.

ESSAYS POLITICAL AND HISTORICAL. By Charlemagne Tower. J. B. Lippincott Co., Washington Square, Philadelphia, Pa. 1914. pp. 306. $1.50.

In these essays by our former ambassador to Russia and to Germany and former minister to Austria-Hungary, there are many of interest to lawyers. The titles of some of the essays are: "The European Attitude Towards the Monroe Doctrine", "The Treaty Obligations of the United States Relating to the Panama Canal",

Digitized by Google

"Diplomacy as a Profession"," Some Modern Developments of International Law", and "The Relations of the United States to Arbitration for Settlement of International Disputes". We note a singular omission in the "Essay on Some Modern Developments of International Law." The learned author stops his discussion of the doctrine of expatriation with the act of 1868. The act of 1907 creating the presumption of expatriation as against naturalized American citizens who reside abroad for more than two years, in certain cases, is not referred to.

The essay on "Diplomacy as a Profession" contains much interesting information as to the etiquette and practice of diplomacy which we believe is not to be found elsewhere.

O. K. M.

CONCERNING JUSTICE. By Lucilius A. Emery. Yale University Press, 209 Elm St., New Haven, Conn. 1914. pp. 170. $1.35 net.

The former Chief Justice of the Supreme Court of Maine, in this little book comprising the Storrs Lectures before the Yale Law School in 1914, discusses the definitions of justice from the time of Plato to the present day. He emphasizes the idea that Bentham's principle of the greatest happiness for the greatest number does not embrace the whole principle of justice. He rather finds Aristotle's definition of justice as "that virtue of the soul which is distributive according to desert" a more satisfactory statement. In other words, Judge Emery is a firm believer in the theory that there are certain natural rights,—that right cannot be defined merely in terms of what the majority declares to be right. The right to labor is no more sacred in Judge Emery's eyes than the right to earn interest on capital, nor is it any less so. He finds justice in the equilibrium between fundamental rights. The constitutional system of the United States with the courts protecting the rights of the individual against the encroachments of majorities, he believes to be the best system ever devised for the protection of the citizen. He admits that courts are not infallible, but contends that they more often err in the direction of sustaining unjust legislation than in the contrary direction. He cites as examples the Charles River Bridge case, the Slaughter House cases, the Grain Elevator cases and the Chinese Exclusion cases. A strong and independent judiciary is an essential to the preservation of justice, and such a judiciary must be placed above the passing whim of "impatient and changeable majorities".

The main virtues of the author's thinking are restraint and balance. The style reflects these qualities. In spite of his deep feeling, we have failed to notice any impatience or petulance of speech. Whether one agrees or not with his theories of rights, one must admire the dignity and force with which the author's thesis is presented.

O. K. M.

Digitized by Google

Books Received

LEGAL PRINCIPLES OF PUBLIC HEALTH ADMINISTRATION. By Henry Bixby Hemenway. T. H. Flood and Co., 214 W. Madison St., Chicago, Ill. 1914. pp. xxxvi, 859. $7.50.

ADDRESSES OF U. M. ROSE. WITH A BRIEF MEMOIR BY GEORGE B. ROSE. George I. Jones, 202 South Clark St., Chicago, Ill. 1914. pp. 412. $3.00.

LANDMARKS OF A LAWYER'S LIFETIME. By Theron G. Strong. Dodd, Mead and Co., 4th Ave. and 30th St., N. Y. 1914. pp. 552. $2.50 net.

THE JUVENILE COURT AND THE COMMUNITY. By Thomas D. Eliot. The Macmillan Co., 66 Fifth Ave., N. Y. 1914. pp. xv, 234. $1.25 net.

THE JUDICIARY AND THE PEOPLE. By Frederick N. Judson. Yale University Press, 135 Elm St., New Haven, Conn. 1913. pp. 270. $1.35 net.

DISTRIBUTION OF ESTATES OF DECEASED PERSONS IN MASSACHUSETTS. Prepared by Guy Newhall, Lynn, Mass. June, 1914. pp. 4. $.10.

HUBBELL'S LEGAL DIRECTORY. The Hubbell Publishing Co., 309 Broadway, N. Y. 1915. pp. x, 1279. $5.35.

COMMON SENSE IN LAW. By Paul Vinogradoff. Henry Holt and Co., 34 W. 33rd St., N. Y. 1914. pp. 256. $.50.

BENTHAM'S THEORY OF LEGISLATION, BEING PRINCIPES DE LEGISLATION AND TRAITES DE LEGISLATION, CIVILE ET PENALE. Vol. I. PRINCIPLES OF LEGISLATION. PRINCIPLES OF THE CIVIL CODE. Translated and edited from the French of Etienne Dumont by Charles Milner Atkinson. Oxford University Press, 35 West 32nd St., N. Y. 1914. pp. xv, 310. $2.60.

THE ANTI-TRUST ACT AND THE SUPREME COURT. By William Howard Taft. Harper and Brothers, Franklin Square, N. Y. 1914. pp. 133. $1.25 net.

A TREATISE ON ATTORNEYS AT LAW. By Edward M. Thornton. Edward Thompson Co., Northport, Long Island, N. Y. 1914. Vol. 1, pp. cclxxx, 624; vol. 2, pp. 625, 1499. $12.00.

MANUAL OF CORPORATE MANAGEMENT WITH FORMS. By T. Carl Spelling. Second edition by Curtis Hillyer. Bender-Moss Co., 11 City Hall Ave., San Francisco, Cal. 1914. pp. viii, 812. $6.00.

A NEW INCOME TAX MANUAL. By Joseph Walker Magrath. The Bench & Bar Company, 27 Cedar St., N. Y. 1915. pp. iv, 97. $1.50.

THE ILLEGALITY OF THE TRIAL OF JESUS. By Honorable John

Digitized by Google

E. Richards. THE LEGALITY OF THE TRIAL OF JESUS.. By S. Srinivasa Aiyar. A. L. Chatterton, 354 Fourth Ave., N. Y. 1914. pp. 92. $2.00.

PRINCIPLES OF COMPANY LAW. By Alfred F. Topham. Fourth edition. Butterworth and Co. (Canada) Ltd., 191 Hargrave St., Winnipeg, Manitoba, Canada. 1914. pp. xl, 376. $1.50.

THE LAW OF NATIONS AND THE WAR. By A. Pearce Higgins. Oxford University Press, 35 W. 32nd St., N. Y. 1914. pp. 29. $.05.

MODERN AMERICAN LAW. A COMMENTARY ON THE FUNDAMENTAL PRINCIPLES OF AMERICAN LAW AND PROCEDURE, ACCOMPANIED BY LEADING ILLUSTRATIVE CASES. Prepared under the editorial supervision of Eugene Allen Gilmore, A. B., LL.B. Blackstone Institute, 20 West Jackson Boulevard, Chicago, Ill. 1914. Vol. I, pp. xxxv, 922; vol. II, pp. xxvii, 915; vol. III, pp. xxxi, 850; vol. IV, pp. xxx, 880, vol. V, pp. xxxix, 995; vol. VI, pp. xxxii, 921; vol. VII, pp. xxx, 844; vol. VIII, pp. xxix, 787; vol. IX, pp. xxvii, 833; vol. XI, pp. xxvi, 812. $60.00 per set of fifteen volumes.

A REVIEW OF BLACKSTONE'S COMMENTARIES WITH EXPLANATORY NOTES. By Marshall D. Ewell, LL.D. Second edition, Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1915. pp. xvi, 867. $4.50.

SCINTILLAE JURIS AND MEDITATIONS IN THE TEA ROOM. By the Hon. Mr. Justice Darling. Stevens and Haynes, 13 Bell Yard, Temple Bar, London, W. C., England. 1914. pp. xv, 209. $1.20.

POLARIZED LAW. THREE LECTURES ON CONFLICT OF LAWS, DELIVERED AT THE UNIVERSITY OF LONDON. By T. Baty. Stevens and Haynes, 13 Bell Yard, Temple Bar, London, W. C. England. 1914. pp. xv, 210. $1.80.

GOOD WILL, TRADE MARKS AND UNFAIR TRADING. By E. D. Rogers. A. W. Shaw Co., Wabash Ave. and Madison St., Chicago, Ill. 1914. pp. 288. $2.50 net.

THE PUBLICATIONS OF THE SELDON SOCIETY. Volume XXVI. Year Books of Edward II, Volume VI, 4 Edward II, A. D. 1310-1311. Edited by G. J. Turner. Bernard Quaritch, 11 Grafton St., New Bond St., London, W., England. 1911. pp. civ, 228. £1, 8s.

THE PUBLICATIONS OF THE SELDON SOCIETY. Volume XXX. Select Bills in Eyre, A. D. 1292-1333. Edited by William Craddock Bolland. Bernard Quaritch, 11 Grafton St., New Bond St., London, W., England. 1914. pp. lxiii, 198. £1, 8s.

Digitized by Google

California Law Review

Volume III. MAY, 1915 Number 4

The New Public Land Policy with Special Reference to Oil Lands

THE sentiment of the people of the United States, as reflected by the attitude of the President, of Congress and of the Supreme Court of the United States with regard to the disposal of certain of the lands of the public domain has in the past few years undergone a vital and radical change. This recent change is the outcome of a marked conflict of opinion as to the appropriate manner of disposing of the remainder of the public domain.[1]

The public lands acquired by the federal government during the past century by cession, purchase and conquest have amounted to over one and a half billion acres. This immense empire was, when acquired, an almost totally undeveloped wilderness and in order to encourage and foster its settlement and development, the government held out great inducements, not only to its own citizens, but to the citizens of other countries who were willing to transfer their allegiance and become pioneers. Agricultural lands were given away to those who became actual settlers and lands valuable for other purposes were sold at nominal prices. Mineral lands were "declared to be free and open to exploration and purchase."[2] This lavish policy, coupled

[1] This new policy does not materially affect the disposition of lands which are purely agricultural in character and which will continue to be disposed of in accordance with the provisions of the various existing acts of congress providing for such disposal. As George Otis Smith said before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, "in the case of agricultural lands there is the home on the land idea, which puts them in a class by themselves". Neither is there any pronounced attempt at present to materially change the policy of disposing of metalliferous lands.

[2] § 2319 U. S. Rev. Stats.

Digitized by Google

with the wonderful discoveries in these lands of wealth of mine, forest, water and water power available to all comers, has resulted in the disposition by the federal government and the passing into private ownership of by far the more fertile and valuable half of this vast acreage.

Awakened by this rapid shrinkage of the public domain and the realization that if prompt action were not taken all of the valuable public lands would pass into private ownership, certain leaders in the creation of public opinion started a new trend of thought, having for its basis certain fundamental ideas.[8] These were, briefly, the belief that the liberal policy of the government in holding out inducements to prospectors and pioneers had, in the main, accomplished its purpose, and in many instances the disposal of natural resources had far over-reached the point where the greatest public good would be subserved by a continuation of that policy; that there were certain of these resources so intimately associated with the future welfare of the nation that it was for the best interests of the public at large that these resources, viz: timber, coal, petroleum, water power, phosphates, potash, etc. should be retained in public ownership since their use could thus be best conserved and

---

[8] Apropos of this subject, Secretary of the Interior, Franklin K. Lane has the following to say:

"....there exists a feeling in the West that its affairs and needs have not been given that consideration at the hands of the National Government which they merit..... they are unable to understand why ways have not been found by which the great bodies of coal and oil lands, of phosphate and potash lands, may be developed, and waters of the mountains made available for the generation of power and the redemption of the desert. There is one very simple explanation for the existence of this feeling. We have adventured upon a new policy of administering our affairs and have not developed adequate machinery. We have called a halt on methods of spoliation which existed, to the great benefit of many, but we have failed to substitute methods, sane, healthful, and progressive, by which the normal enterprise of an ambitious people can make full use of their own resources. We abruptly closed opportunities to the monopolist, but did not open them to the developer..... we had put into force a new land policy, which caused dismay and discontent..... Congress has always been most generous as to the disposition of the national lands. .... out of the abuse of the Nation's generosity there came a reaction against a policy that was so liberal as to be dangerous. .... So there has slowly evolved in the public mind the conception of a new policy—that land should be used for that purpose to which it is best fitted, and it should be disposed of by the Government with respect to that use. To this policy I believe the West is now reconciled....." Annual Report of the Secretary of Interior (1913), pp. 1-3.

Digitized by Google

controlled; and that there was also imminent danger that they might be monopolized to the detriment of the public.[4] The idea of a public revenue to be derived from the leasing and sale of these resources has also come into prominence. This is the modern idea of conservation of natural resources.[5]

One of the first of these resources to be conserved, as having a most vital effect upon the future welfare of the nation, were the forests. The assurance of a conserved supply of lumber and the regulation of stream flow and its natural benefit to the navigability of such streams were the controlling inducements which have resulted in the withdrawal from disposal and permanent reservation of millions of acres of timbered lands now embraced within the "national forests" in the western states.[6]

---

[4] "The objects to be sought by amendment of the public land laws are, first, purposeful and economical development of resources for which there is present demand, with retention of such control as may insure against unnecessary waste or excessive charges to the consumer, and, second, the reservation of title in the people of all resources the utilization of which is conjectural or the need of which is not immediate." Geo. Otis Smith, Annual Report of the Director of the U. S. Geological Survey, (1911), p. 9. These annual reports, 1908 to date, contain much interesting information and forecast the change in public land policy.

[5] Of course, conservation in its broadest sense embraces a far greater field and is applicable to the use of private as well as of public resources. Conservation in this modern sense has been defined to be "the utilization of lands for their greatest value". The Classification of the Public Lands, by George Otis Smith, et al., Bulletin 537 U. S. Geological Survey, p. 1. Another definition, credited to Dr. C. W. Hayes, chief geologist of the U. S. Geological Survey, is "the utilization of natural resources with a maximum efficiency and a minimum of waste". Professor Van Hise has defined conservation of natural resources to mean "that they should remain as nearly undiminished as possible in order that this heritage of natural wealth may pass in full measure to succeeding generations". The Conservation of Natural Resources in the United States, by Chas. R. Van Hise (1910).

A more comprehensive definition, with special reference to public lands, is the following: "National conservation. . . . . is a policy of primarily placing the remnant of the public domain, other than that portion of it which is essentially agricultural in character, in a state of reservation and subsequently dealing with it or its natural resources in such a manner as will economically yield the best results to all the people. Its principal aim is to obtain a maximum economic production at a minimum of waste; to prevent individuals or aggregations of individuals from securing monopolies; and to exact some equivalent for the privileges granted". Lindley on Mines, 3d ed., § 200. Anyone interested in the subject will find an excellent presentation of "Conservation Measures and their Effect on the Mining Industry" in §§ 200-200c of this work.

[6] Acts of March 3, 1891, 26 Stats. at L. 1103; June 4, 1897, 30 Stats. at L. 1103; Feb. 1, 1905, 33 Stats. at L. 628; Mar. 4, 1907, 34 Stats. at L. 1256; etc.

Digitized by Google

Public sentiment rapidly crystallized so that coal lands were next deemed of such far reaching value to the public that their conservation by retention of federal control was urged upon congress[7] and in rapid succession followed similar proposals as to lands valuable for water power control[8], asphalt, petroleum oil and gas, nitrates, phosphates and potash.[9] Congress has either already enacted legislation providing for the federal control of lands of this character or is expected to act shortly on these subjects. The federal reclamation and irrigation of arid lands in the West is also a part of this modern conservation movement.[10]

This comparatively sudden reversal of policy on the part of the federal government and the termination of the opportunity for private interests to acquire these valuable lands very naturally met with determined opposition. The constitutionality of these conservation measures adopted by congress and the action of the President in anticipating such legislative action by withdrawing from private entry the lands in question pending the enactment of the desired statutes, has been seriously questioned on every conceivable ground.

Of greatest immediate interest to California, as far as the operation of the new public land policy is concerned, has been the withdrawal of oil lands situated on the public domain within the state. The California deposits of mineral oil are among the most extensive and important deposits in the world and the manner in which the federal government will administer these withdrawn lands and provide for the extraction and disposition

---

[7] Until July, 1906, the government had followed the policy of disposing of coal lands at the minimum prices prescribed in the statutes, U. S. Rev. Stats. § 2347. Thereafter it classified these lands, and has disposed of them at appraised values, in many cases far in excess of the statutory minimum. The Public Lands Committee of the senate eliminated all reference to coal from the general leasing bill passed by the house at the last session of congress, for the reason that the need for new legislation for the mining of coal on the public lands is not so great as that for the other minerals specified. Senate Report, No. 947, 63rd congress, 3rd session.

[8] The executive withdrawal of lands valuable for water-power sites, irrigation, etc. was authorized by congress, June 25, 1910, 36 Stats. at L. § 847.

[9] These latter substances are considered of great general economic value because of their use in the manufacture of fertilizers to renew the productivity of worn-out agricultural lands.

[10] Act of June 17, 1902, 32 Stats. at L. 388, amended June 25, 1910, 36 Stats. at L. 836.

Digitized by Google

of this oil is of vital interest to the future of this state. Because of the arid character of the surface lands, vast areas of the territory overlying the oil strata had remained a part of the public domain. The discovery of the existence of this oil in commercial quantities and the creation of a market for the crude output resulted in a rush of locators to the oil fields commensurate with and in many respects similar to the congestion and conditions resulting from new "strikes" or discoveries of the gold fields.

The general placer law was the only operative mining law permitting of the acquisition of these deposits.[11] Immediately following the disclosure of the value of these public oil lands there were the usual attempts to acquire them by indirection and by distorting other land laws in the attempt to defeat the mineral claimant. "Scrippers", i. e. those who attempted to make selections of these oil lands in lieu of other lands under an exchange system provided for by law, homesteaders, desert entrymen, etc., all proceeding under laws providing for the acquisition of agricultural lands, which laws expressly exclude mineral lands from their operation, hastened to make filings, in most instances lacking in good faith. Locators under the mining laws even, claiming discoveries of gypsum cropping on the surface, were also subject to the valid criticism of attempting to gain by subterfuge the valuable oil deposits which they could not acquire directly without the expenditure of time and money. These attempts were rendered possible by the physical fact that the valuable oil-bearing sands lay at considerable depths below the surface and could be reached only after drilling to the depth of hundreds or even thousands of feet and at great cost. In some instances it has taken wells of 4000 or 5000 feet in depth and the expenditure of over $250,000.00 to reach the oil. The courts early held that only actual discoveries of oil by drilling would satisfy the statutory requirement of discovery essential to validate a mining claim and that mere oil seepages or stains or other surface indications were not sufficient.[12]

---

[11] §§ 2329-2333 U. S. Rev. Stats., a codification of the Federal Placer Act of 1870. The act of Feb. 11, 1897, 29 Stats. at L. 526, provided that lands containing petroleum or other mineral oils could be acquired under the laws relating to placer mineral claims.

[12] Nevada Sierra Home Oil Co. v. Home Oil Co. (1899), 98 Fed. 673, at p. 675; Miller v. Chrisman (1903), 140 Cal. 440, 75 Pac. 1083, 74

Digitized by Google

While this holding gave the fictitious agricultural claimants a certain technical advantage over the bona fide mineral claimants, yet the courts made short work of these subterfuges and finally eliminated most of these pseudo filings from further serious consideration.[13] The land department also came to the rescue of the oil miners and withdrew from agricultural entry large areas of land adjacent to the proven territory pending classification by government geologists.[14] This peculiar situation forced on government officials an early realization of the fact that the placer mining laws with their rigid discovery requirement were a misfit when applied to the location of oil lands.[15] The courts of California and Wyoming aided the diligent oil locator in a measure, by a liberal interpretation of the inchoate right acquired by him in making his location prior to actual discovery and held that such a locator, who in good faith was prosecuting the drilling of his discovery well with reasonable diligence, would be protected to the full extent of his boundaries from clandestine or forcible invasion by others attempting to locate subsequently.[16] Thus many of the serious problems which confronted the oil locator in the early days of the field have since been removed, so that the amount of litigation arising from these original sources is becoming relatively unimportant.

Pac. 444, 98 Am. St. Rep. 63; s. c. (1905), 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. Rep. 468.

[13] Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900), 104 Fed. 20, 112 Fed. 4, (1903), 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692; Kern Oil Co. v. Clarke (1897), 30 L. D. 550, on review, 31 L. D. 288; State of California (1913), 41 L. D. 592; Hirshfeld v. Chrisman (1911), 40 L. D. 112; see also Diamond Coal Co. v. United States (1914), 233 U. S. 236, 58 L. Ed. 936, 34 Sup. Ct. Rep. 507; Washington Securities Co. v. United States (1914), 234 U. S. 76, 58 L. Ed. 1220, 34 Sup. Ct. Rep. 72; Leonard v. Lennox (1910), 181 Fed. 760.

[14] United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 315. Similar withdrawals from non-mineral acquisition have been made as a measure of protection to surface locators under the mining laws, of lands overlying deep seated deposits of copper ore in Arizona. Report of Director of U. S. Geological Survey (1913), p. 154.

[15] Classification of the Public Lands, Bulletin 537 U. S. Geological Survey, p. 38; Report of Secretary of the Interior Lane (1913), p. 13.

[16] Weed v. Snook (1904), 144 Cal. 439, 77 Pac. 1023; Merced Oil Co. v. Patterson (1908), 153 Cal. 624, 96 Pac. 90; Miller v. Chrisman (1903), 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Borgwardt v. McKittrick Oil Co. (1913), 164 Cal. 650; Little Sespe Cons. Oil Co. v. Bacigalupi (1914), 167 Cal. 381, 139 Pac. 802; Smith v. Union Oil Co. (1913), 166 Cal. 217, 135 Pac. 966; Whiting v. Straup (1908), 17 Wyo. 1, 95 Pac. 849.

Digitized by Google

In addition to this conviction that the placer laws were a misfit, the land department was also influenced most forcibly by the conservation movement which has already been commented on and which is resulting in the establishment of the new public land policy. The appreciation of the importance of oil as a mineral fuel and source of heat and power, next to that of coal, was accentuated by the magnitude of the discoveries in the oil fields of California and Wyoming. Here was an asset of vital concern to the future welfare of the nation found in almost fabulous quantities on land which was in part still public domain. The rapidity with which these lands were being located and thus passing into private ownership, convinced the public officials and leaders in conservation ideas that if prompt action were not taken, most of the available territory would be privately absorbed and as far as petroleum was concerned, the new policy of government ownership and control would be impossible of accomplishment.[17]

The importance of conserving a supply of this new fuel for the requirements of the navy was also in the minds of the interested officials though it had not at that time assumed the importance which has since arisen through the more definite determination to use fuel oil in the navy.[18] Acting on the suggestion of his advisors in the land department,[19] President Taft caused an executive order or proclamation to be issued on September 27, 1909, withdrawing from all forms of disposal and "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain", over three million acres of land in California and Wyoming which included most of the territory known or thought by the Geological Survey to be valuable for oil.[20] This sudden and sweeping

[17] See United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 310; The Classification of Public Lands, Bulletin 537 U. S. Geological Survey, p. 38.

[18] At the request of the navy department, two naval petroleum reserves were created in the California oil fields on Sept. 2, 1912, and Dec. 13, 1912, estimated to contain 250,000,000 barrels of oil. Report of Director of U. S. Geological Survey (1913), pp. 151-152.

[19] The history of the origin and development of this proposal is outlined by its chief sponsor, George Otis Smith, before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, 63rd congress, 3rd session, pp. 208-210.

[20] Of course, much of the land withdrawn included private titles which had already vested and which were consequently not affected by the withdrawal. The net area of the public lands thus withdrawn could

Digitized by Google

action on the part of the executive in withdrawing practically all of the remaining public lands possessing probable oil values caused great consternation among the oil operators. It injected a tremendous element of uncertainty into the operations of many and resulted in a decided curtailment of expenditures looking toward the making of discoveries. Many bona fide operators were placed in the position of not knowing whether their expenditures already made would be forfeited or not, and yet they hesitated in the dubious experiment of continuing to "throw good money after bad". President Taft himself was not convinced of the unqualified legality of his act[21], and in order to place his power of withdrawal beyond question he urged congress to give him positive statutory authority, which resulted in the passage of the Act of June 25, 1910.[22] Immediately after its passage and acting under its authorization, he again caused these same lands and additional lands which had been withdrawn from time to time subsequent to the first withdrawal, to be withdrawn. The validity of this later withdrawal in pursuance of congressional sanction has not been seriously questioned. The Withdrawal Statute expressly provided:

> "That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act."

Thus all question as to the validity of the original Taft withdrawal of September 27, 1909, was left open for the determination of the courts.[23] The practically universal consensus of

---

only be estimated in a very general way, for the included location titles were in all conditions varying from mere "paper locations" not accompanied by actual possession, nor followed by any attempt at discovery work, to locations where all the legal requirements had been strictly complied with and discovery actually made. Until "court has been held" and all of the underlying and essential facts disclosed, it will be impossible to determine whether many of these private claims are valid or not. The Government has instituted suits to test the validity of many of these private claims.

[21] This doubt was expressed by the President in his message to congress of January 14, 1910, and also in public speeches.

[22] 36 Stats. at L. 847. This act only provided for the withdrawal of mineral lands containing coal, oil, gas and phosphates, but was amended August 24, 1912, (37 Stats. at L. 497), in order to provide for the withdrawal of lands valuable for potash, and in anticipation of the fact that other minerals might later be found desirable to be included in such reservations, the act was made operative as to all non-metallic minerals.

[23] In the recent Midwest decision by the Supreme Court of the United States and hereinafter noted, the majority opinion states that

Digitized by Google

opinion among the oil operators and the lawyers of the West who examined into the question, was that the first or executive withdrawal was invalid. Acting on opinions of their legal advisors to this effect, many operators located withdrawn lands, or commenced diligent prosecution of work on lands already located.[24] As a consequence, cases involving lands affected by the first order of withdrawal began to arise, necessitating a determination of the validity of this executive action. The land department first passed on the question, deciding that the order of September 27, 1909, was valid.[25] Then Judge Riner, federal District Judge for Wyoming, in the now famous Midwest case, sustained a demurrer to the bill of complaint filed by the United States, holding that the withdrawal order was void.[26] This case was taken to the Supreme Court of the United States and became the test case on this question. Meanwhile on June 1, 1914, Judge Dooling, one of the federal District Judges in California, decided[27] that the promulgation of the order in question was "an encroachment upon the domain of Congress" and was therefore unlawful.

The Midwest case just referred to involved a tract of public land in Wyoming which was taken possession of by private individuals six months after its withdrawal under the order of September 27, 1909. A well was drilled, discovery of oil made and quantities of oil extracted. The federal government brought suit to recover the land and for an accounting. The government took an appeal from the District Court's ruling sustaining the demurrer and dismissing the bill. The Circuit Court of Appeals certified certain questions to the Supreme Court of the United States which latter court ordered the entire record sent up for consideration. The Supreme Court recently decided the case in favor of the government, reversing the ruling of the Wyoming federal District Court.[28]

"The Act left the rights of parties . . . . to be determined by the state of the law when the proclamation was issued".

[24] The withdrawal act of June 25, 1910, expressly protected bona fide claimants of oil lands who were, at the date of any order of withdrawal theretofore or thereafter made, diligently prosecuting work leading to a discovery.

[25] In re Lowell (1911), 40 L. D. 303.

[26] No written opinion was filed in this case.

[27] United States v. Midway Northern Oil Co. (May 29, 1914), 216 Fed. 802.

[28] United States v. The Midwest Oil Company (Feb. 23, 1915), 35 Sup. Ct. Rep. 309. Five justices joined in the prevailing opinion,

Digitized by Google

The case was twice argued orally and several briefs were filed by parties interested in other lands similarly affected. The importance of this decision to the oil industry, as well as the interesting character of some of the problems involved, will justify a brief analysis of the case.

The single and controlling question was the validity of the withdrawal order and the power of the President to make such an order in the absence of positive congressional authorization. Justice Lamar wrote the prevailing opinion and held that it was unnecessary to determine as an original question whether the President had this power because "of the legal consequences flowing from a long continued practice to make orders like the one here involved". He calls attention to the fact that such a practice dates from an early period in the history of our government and that during the past eighty years a multitude of executive orders have been made without express statutory authority, operating to withdraw every kind of land—mineral and non-mineral—that would otherwise have been open to private acquisition under existing acts of congress. Instances of at least 252 executive orders withdrawing public lands for military, Indian, and bird reservations were cited where there were no express statutes empowering the President to withdraw any of the lands affected. He said that it was natural that the government should retain for these purposes what it already owned, especially since no private right was, at the date of the withdrawal, in existence to be injured, for prior to the initiation of some right under public statute, no citizen had an enforceable interest; that the President was in a position to know when the public interest required such withdrawals and his action was subject to disaffirmance by congress which had repeatedly acquiesced in the practice; and that this was also the interpretation placed upon the existence of the power by the law officers of the government at various times.

In answer to the argument that while there might be this usage yet these instances of the exercise of this power did not establish its validity, Justice Lamar said:

> "But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally

---

Justice McReynolds not participating. Three justices dissented. A petition for rehearing was filed April 16, and denied April 19, 1915.

Digitized by Google

adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be as often repeated as to crystallize into a regular practice".

Therefore, usage itself shall be given weight in determining the existence of a power.[29] Not that "the Executive can by his course of action create a power" but "the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.". The United States, acting through congress, is the proprietor and owner of the public domain, and conditions may arise requiring that, in the public interest, the land be withheld from sale and this power may be granted by implication to the executive just as might be the case between a private owner and his agent. The attempted distinction between reservations and withdrawals was held unavailing. If permanent reservations made by the executive and already noted are valid, then the lesser exercise of similar power, involved in making a temporary withdrawal in aid of future

---

[29] The best considered criticism of this doctrine is to be found in Cooley's Constitutional Limitations 7th ed., Chapter IV, pp. 102-107, from which the following extracts are taken:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. . . . . .

"Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.

"Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction . . . . can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the

Digitized by Google

legislation, is lawful and examples were cited where this power of withdrawal had also been exercised, and attention called to the fact that in 1902 the senate specifically requested information of the secretary of the interior as to the extent that public lands had been withdrawn and the authority for such action. Congress after receiving this information did not repudiate the practice and its silence was acquiescence, or equivalent to consent, until revoked by subsequent congressional action.

An unusually vigorous dissenting opinion was written by Justice Day and concurred in by Justices McKenna and Van Devanter.[80]

Justice Day quotes article four, section three, of the Constitution of the United States, which empowers congress

> ". . . to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . "

---

true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of Stuart v. Laird, above referred to, the practical construction was regarded as conclusive. . . . .

"It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

It will be noted that the case of Stuart v. Laird (1803), 1 Cranch 299, 2 L. Ed. 115, adversely commented on by Cooley, is one of the leading authorities on which the prevailing opinion in the Midwest case is based. The authorities discussed in the note on p. 107 of Cooley are also of considerable interest in this connection as indicating that, after all, the question is fundamentally a matter of opinion as to whether it is best to "bend the Constitution to suit the law of the hour" and yield "to considerations of expediency in expounding it" or whether "the success of free institutions depends upon a rigid adherence to the fundamental law", whereas "by yielding to such influences constitutions are gradually undermined and finally overthrown."

[80] It is interesting to note that these latter two are western appointees and together with the two federal District Judges below

Digitized by Google

and cites a previous decision of the Supreme Court which holds that

> "this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise".[31]

He states that there is nothing in the Constitution suggesting or authorizing any augmentation of executive authority said to arise by implication from the tacit consent of congress in its long acquiescence in such executive action of making the specified withdrawals. Withdrawals have been made by the President in the past and have the sanction of judicial approval but only in cases (a) where congress has already declared its policy as being an appropriate one for the use of public lands such as military and Indian reservations, or (b) where grants of land by congress are so conflicting that the withdrawal of the lands affected is sustained until congress has had an opportunity to clear up the ambiguity.[32]

Taking up the Taft withdrawal, Justice Day calls attention to the fact that congress had by specific statute[33] authorized the location of lands valuable for oil under the placer mining laws. The sole purpose for making the withdrawal was in anticipation that congress might provide a better system for the disposition of such lands and to preserve some oil lands in California as a basis of naval supply in the future. It is not claimed that the President had express authority from congress. Such withdrawals must be limited to purposes which congress has itself recognized by direct legislation or long continued acquiescence as public purposes. It is conceded that the President might reserve tracts for definitely fixed public purposes declared by congress, such as military or Indian reservations, but the action here taken in withdrawing a large part of the public domain from the operations of the public land laws is neither sanctioned by the Constitution, nor conferred by congressional legislation, nor by that

---

who declared this order invalid, presumably reflect the western thought and attitude toward this question.

[31] Wisconsin etc. R. R. Co. v. Price County (1890), 133 U. S. 496, 504, 10 Sup. Ct. Rep. 341.

[32] Justice Day entered into a rather elaborate review of the specific withdrawals claimed to constitute the basis for the executive custom of withdrawal held in the prevailing opinion to have ripened into implied authority and classifies these withdrawals under either the one heading or the other.

[33] February 11, 1897, 29 Stats. at L. 526.

Digitized by Google

long acquiescence as to be the equivalent of a grant. The President's powers are defined by the Constitution which does not confer upon him any power to enact, suspend or repeal laws of congress, and the Supreme Court has refused to sustain withdrawals made by the executive in contravention of a policy for the disposition of lands expressly declared in acts of congress.[34] In order to be valid, an executive withdrawal must either be authorized by express congressional authority or clear implication of such authority. Justice Day calls attention to the limited powers of the United States government vested definitely by the Constitution in the three co-ordinate branches of the government and quotes from the famous case of Kilbourn v. Thompson, to the effect that it is essential to the successful working of this system that the respective functions of these branches shall be broadly and clearly defined and that they shall not be permitted to encroach upon the powers confided in the other branches, but each "be limited to the exercise of the powers appropriate to its own department and no other",[35] and concludes the dissenting opinion with the following language:

> "These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.
>
> In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress, did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a

[34] Cases are cited involving withdrawals in aid of railroad grants held to have been invalid for the foregoing reason.

[35] Kilbourn v. Thompson (1880), 103 U. S. 168, at p. 190.

Digitized by Google

different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive."

The foregoing analysis of the two opinions will indicate that they are based respectively upon fundamentally different conceptions of governmental policy as embodied in the federal constitution.

The prevailing opinion rests upon the conception that "government is a practical affair intended for practical men" and that the federal Constitution should be construed accordingly. Instances where the executive branch of the government has withdrawn lands in aid of governmental functions, either expressly or impliedly sanctioned by congressional action, are held to constitute a precedent and to create a power by implication which the President admittedly did not possess originally under the terms of the Constitution, and which gives him the authority to withdraw immense tracts of public domain, in aid of contemplated legislation, from the operation of existing acts of congress specifically providing for the private acquisition of such lands. To reach so liberal a conclusion as to the existence of this executive power, the majority of the court were unquestionably influenced by the modern conservation policy and the pressing necessity for immediate action in the effort to retain under public control as large an area of valuable oil lands as possible. The fact that no private interest existing at the date of the withdrawal was affected, was also a potent consideration. Those who attempted to secure private rights thereafter did so with full knowledge of the executive withdrawal and acted at their peril.

On the other hand, the dissenting opinion is based on a strict conception of the distinct spheres of action of the three branches of the government and the danger of a centralization of power in the executive resulting from its invasion of the legitimate and exclusive functions exercised by the other branches. Irrespective of the beneficial results to be attained by the consummation of federal conservation policies, the minority members of the court were influenced by the bald proposition that the executive in withdrawing all of the lands of the public domain

Digitized by Google

known or thought to be valuable for oil[86] was virtually nullifying and suspending the operation of the last expressed will of congress contained in its positive declaration that all lands valuable for petroleum shall be free and open to exploration and purchase by citizens under the placer mining laws.

The fact that the executive assumed this power as a result of a conviction that new laws should be enacted is interesting to note. If the executive can suspend the operation of existing statutes on the theory that they are detrimental to the public interests and can substitute his views for those last expressed by congress, even if only temporarily, there may arise occasions where this power might be exercised in hostility to what may prove to be the public interest. It was to avoid just such contingencies that the strict division of power as between the various branches of the government was originally conceived by the framers of the Constitution. It would also be interesting to know how long the executive could lawfully suspend the operation of statutes and continue such suspension in force in the event that congress did not see fit to make the contemplated changes in the existing law. Of course, the answer can be made that congress has the power to nullify such executive action, since it retains the fundamental and exclusive power to legislate on such subjects, but it may be said with equal force that congress is in session during a large portion of each year and can act in the original instance on such contemplated proposals and, if deemed expedient, authorize the executive to make necessary withdrawals in the interim in order to preserve the *status quo*. This is really the fundamental difficulty. Logically, congress is the body contemplated by the Constitution to consider and originate legislation and make radical changes in existing legislation affecting the public lands, but as a matter of practical operation, congress has become to a greater and greater degree an unwieldy body, slow to consider and slower to act. From the very nature of its organization, representing as it does such radically different viewpoints on most of the problems presented for its consideration, it is prone to debate rather than to legislate. This has

---

[86] The withdrawal of September 27, 1909, "included not only all known California oil lands . . . . but also the Wyoming lands." George Otis Smith, in Senate Public Lands Committee hearings on Oil Lands Leasing Bill, p. 209.

Digitized by Google

resulted in the executive stepping in and usurping, to a degree, certain of the functions unquestionably vested exclusively in congress by the federal Constitution if interpreted in the spirit which actuated its framers. This has become notably conspicuous in the case of the last few administrations where the executive branch of the government has formulated to a large degree the legislative program, prepared to the letter the actual bills proposed for passage, and employed all available political pressure to insure their passage in their original form.

We are, therefore, confronted with an actual condition which has by force of circumstances compelled a material deviation from the policy outlined by the framers of the federal Constitution and the decision in the Midwest case is but a recognition of this change and of the exercise of increased powers by the executive in the attempt to secure a greater flexibility of action and more expeditious results than it is at present possible to obtain from the ponderous and slow-acting legislative branch of the government.

The decision in the Midwest case is, therefore, of far reaching importance, since it sanctions a material enlargement of federal executive power and places a positive stamp of approval on the new public land policy. Of course, congress still has control over the ultimate disposition of these oil lands and may not accept the proposed executive policy as to future legislation, but the trend of recent events practically insures adoption of the new policy either in whole or in large part.

The upholding of the validity of the Taft oil withdrawal adds materially to the importance of the policy which will control the future disposition of public oil lands. As already pointed out, the conservation policy now generally accepted involves the idea of a permanent reservation of title in the federal government and the disposal of the oil under a leasing system on a royalty basis.[87] A bill having this object and fostered by the administration was before the last congress but in the press of other legislation failed of passage.[88] A similar bill is likely to be en-

[87] Legislation of this character has been urged for a number of years by the department of the interior. See the Annual Reports of the Secretary of the Interior, and of the Director of the U. S. Geological Survey for the past few years.

[88] The fact that these oil lands have been withdrawn for over five years and that congress has not acted yet as to their ultimate disposi-

Digitized by Google

acted during the sixty-fourth session of congress.[39] In his report to the Public Lands Committees of congress[40] Secretary Lane states that this bill does not propose any change in the laws governing the disposition of agricultural lands in general; that, instead of conducting a "gigantic land lottery under government auspices" as heretofore, in which a few individuals and corporations have acquired the best oil and coal lands for little or nothing and have then sold the product back to the public at arbitrary prices, the proposed leasing system is open to all comers who wish to prospect and develop these mineral resources on fair terms so as to afford a fair return to the lessee and eliminate to a degree the element of speculation.[41] He points out the fact that the oil lands in private ownership are now largely operated under the leasing system and that though the federal government early abandoned a system of leasing lead mines, the adverse conditions there encountered do not exist today in the case of oil and coal lands.[42]

---

tion is evidence of the difficulty of securing prompt action from this body on most subjects.

> "The West no longer urges a return to the hazards of the 'land is land' policy. **But it does ask action.** It is reconciled to the Government making all proper safeguards against monopoly and against the subversion of the spirit of all our land laws, which is in essence that all suitable lands shall go into homes, and all other lands shall be developed for that purpose which shall make them of greatest service. But it asks that the machinery be promptly established in the law by which the lands may be used. And this demand is reasonable." Annual Report of Secretary of the Interior Lane for 1913, p. 3.

[39] H. R. 16136. An act providing for the leasing of coal lands in Alaska became a law Oct. 20, 1914. U. S. Stats. Ann., Jan. 1915 supp. p. 6. By private resolution, 37 Stats. at L. 1346, the secretary of the interior was authorized to continue the operations of the Owl Creek Coal Co. in Wyoming, which he did by formal lease. See Report of the Secretary of Interior (1912), pp. 10-11.

[40] 63rd congress, 3rd session.

[41] In a letter dated May 1, 1914, addressed to the chairman of the Public Lands Committee of the house, Secretary Lane writes: "The measure deals with the principal fuel and fertilizer minerals found in the public lands, classes of deposits in which the people generally are particularly interested, and which should be so handled as to insure general use at reasonable rates. It would be unwise to permit these resources to be monopolized or gathered into private ownership of a few for speculative purposes".

[42] "The leasing method of disposition is about as fair a disposition as we can expect to make of the publicly owned lands, not simply from the standpoint of economics, but especially from the standpoint of the public interests in the control of some of these minerals that must be considered as absolutely necessary to the industrial life of today."

Digitized by Google

The proposed law passed the House and as finally amended in the senate Committee on Public Lands, provided for a prospector's permit giving an exclusive right for a maximum period of two years to prospect for oil and gas upon a maximum of 640 acres of public land situated not less than two nor more than ten miles from any producing well, or a maximum of 2560 acres when situated over ten miles from such a well. Drilling operations were to be commenced within six months, 500 feet to be drilled in one year and 2000 feet in two years. The applicant must comply with certain formalities of marking the ground and posting notices, and the drilling operations must be carried on as prescribed. Upon establishing a discovery of valuable deposits of oil or gas the permittee becomes entitled to a patent for one-fourth of the area embraced within the permit.

All other deposits of oil and gas on the public domain are subject to lease by the secretary of the interior through competitive bidding, each tract not to exceed 640 acres and such leases to be conditioned upon the payment of a royalty of not more than one-eighth, payable in oil or gas, and a rental of not less than one dollar per acre per annum payable in advance to be credited against the royalties as they accrue for that year. The term of such leases is to be twenty years with preferential right of renewal for successive periods of ten years. The maximum leasehold or leaseholds that can be held by a single lessee in any area of fifty miles square is 640 acres.[48]

In order to protect those oil miners who were affected by the executive withdrawals, it is provided that claimants of land in which oil was discovered, or drilling operations were in actual progress, January 1, 1914, and the claim to which land was initiated prior to July 3, 1910, may, within six months after the passage of the act or within sixty days after the final determination of the right to a patent, relinquish the land to the government and receive a lease therefor upon substantially the same conditions as other lessees, except that no annual rental is prescribed aside from the royalties, and it is further provided that where claimants in good faith located lands prior to withdrawal thereof and continued to occupy the same, and since July 3, 1910, have

---

Hearings on Oil Land Leasing Bill, Public Lands Committee of senate, 63rd congress, 3rd session, pp. 216-217. See also Classification of Public Lands, Bulletin 537 U. S. Geological Survey, pp. 47-50.

[48] There were many regulative provisions of lesser importance.

Digitized by Google

diligently prosecuted work looking toward a discovery and have discovered oil prior to the passage of the act, that such claim may pass to patent under the mining laws.[44]

The secretary is authorized to dispose of the surface of these lands insofar as the surface is not necessary for the use of the lessee.[45] One of the most important provisions of all, requires the payment to the respective states wherein the leased premises are situated of fifty per cent of all moneys received from royalties and

---

[44] On March 2, 1911, congress passed an act to cure a questionable situation arising in numerous cases where an individual acquired more than 20 acres of located land prior to discovery of oil, (36 Stats. at L. 1015). This act was amended August 25, 1914, 38 Stats. at L. 708, to authorize the secretary of the interior to enter into agreements with claimants of producing oil land so as to provide for the disposition of the oil pending final determination of the title of the land where this was questioned by the government.

A curative act applicable to phosphate lands located prior to withdrawal was approved January 11, 1915, and provides for their patenting under the placer laws. Where a lode claim conflicts, no placer patent is to be issued until the adverse lode claim is abandoned, presumably to get rid of any possible claim of an extralateral right.

[45] This policy of severing the surface from the subsurface mineral deposits and disposing of each separately has already been provided for by congress. The importance of this step was recognized by the director of the U. S. Geological Survey, who in his annual report for 1911, p. 10, said: "The first step, both in principle and practice, in any amendment of the land laws, appears to be that of making possible by legislation the separation of surface and mineral rights whenever the two estates have values which can be separately utilized". See also Bulletin 537, U. S. Geological Survey, Classification of Public Lands, pp. 46-47. The Act of July 17, 1914, 38 Stats. at L. 509, provides for the issuance of patents under the non-mineral laws of the United States for the surface of withdrawn lands containing phosphate, nitrate, potash, oil, gas, or asphaltic deposits, with a reservation to the United States of such deposits, together with the right to prospect for, mine and remove the same under appropriate federal laws. The right to occupy the necessary surface for mining operations is also reserved and payment for anv damages to crops and improvements incident to such operations provided for. Agricultural entries of surface lands overlying coal deposits are permitted in the Acts of March 3, 1909, 35 Stats. at L. 844, and June 22, 1910, 36 Stats. at L. 583, amended April 30, 1912, 37 Stats. at L. 105, and April 14 1914, 38 Stats. at L. 335. The Act of August 24, 1912, 37 Stats. at L. 497, provides for the agricultural entry of the surface of oil and gas lands in Utah. The Act of February 27, 1913, 37 Stats. at L. 687, provides for the selection by the state of Idaho of the surface of oil and phosphate lands. This policy of severing the surface from the mineral rights and treating each as distinct properties is unquestionably the ideal system of land and mining law, for the surface and the underlying minerals can in most cases be disassociated and the surface used for agricultural or other non-mineral pursuits with of course the reservation of the right to use enough of the surface as may be essential to mining operations and provision made for the payment of damage suffered by the surface

Digitized by Google

rentals,[46] the other half going into the reclamation fund. This provision is inserted in order to appease the strong western sentiment antagonistic to the permanent retention by the federal government of the proprietary control of these immense areas of land wealth.[47] That this sentiment has a valid basis is apparent from the mere statement of the fact that millions of acres of land containing fabulous values of timber, coal, oil, water-power etc. are to be administered by the federal government to the exclusion of the states within which these resources exist, whereas all of the eastern states and most of the states of the middle west do possess and exercise this exclusive sovereign control over all of the lands and resources within their respective borders, and enjoy the salutary results flowing from such complete exercise of sovereignty. These western states are facing a serious curtailment of sovereign power which places them on a distinct plane of inequality. Here again, if this federal policy is to become a permanent one, as there is every reason to believe, our primary conceptions of the status of the western states which were to be admitted to the Union upon terms of exact equality with all the other states and were to enjoy equal privileges must suffer a profound adjustment to harmonize with these new conceptions.

---

claimant. This separation of these rights is in line with true conservation, since it permits of "the utilization of lands for their greatest value". Many of the continental systems of mining law provide for this severance and it is unfortunate that the United States should not have earlier recognized its ultimate importance.

[46] As to this proposal, Secretary Lane says: "Inasmuch as the title to these oil or other lands would remain in the Government and be excluded from State taxation, it would seem to be fair that a certain percentage of the royalties received should go to the States within which the revenues are raised". Report to Public Lands Committee of Congress.

The Senate Committee on Public Lands reports: "This is deemed a just recognition of the rights of the States in and about the public domain situated within their borders and the right of a State to receive therefrom some revenue and benefit to go toward maintenance of State Government". Report on H. R. 16136, p. 7.

[47] This western attitude is strongly voiced by Justice Henshaw who wrote the opinion in Deseret Water, Oil, etc. Co. v. State of California (1914), 167 Cal. 147, a case decided in bank and where the following language appears:

> "But here we desire to point out that while the state of California was admitted as a sovereign state of the Union upon equal terms with all the other states, and while it has been judicially declared that an essential part of that equality is the disposition of the public lands within the state, to the end that the revenues by taxation therefrom and the control over them may be vested in the state, we have in California a withdrawal by the United States from sale and a placing in reserves of one-third of the area of the

Digitized by Google

This is a question of the interpretation to be placed on the provisions of the federal Constitution which bear on the creation of new states, their status and relation to the other states. If we take the decision in the Midwest case as evidence of the recent trend of opinion entertained by a majority of the federal Supreme Court, we can almost certainly conclude that when this basic question of State v. Federal Rights is presented to that court for decision, it will not consider itself bound by strict letter, but will interpret the Constitution broadly and in the light of the recent public attitude toward conservation problems in general, and will again recognize the doctrine that "government is a practical affair intended for practical men".[48] The question is, after all, an eminently practical one, involving as it does profound economic and social problems, and not only a readjustment of the relations of the individual toward the resources of the public lands, but also a readjustment of the respective spheres within which the state and the federal governments shall operate.[49]

This new public land policy certainly marks a decided step in the direction of centralization of power in the federal govern-

---

whole state—an area greater than the combined territory of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland. Not this alone, but we have in these withdrawals a refusal upon the part of the United States to yield to the state of California control over its natural sources of wealth. Its forests, its mines, its oil-bearing lands, its power sites and possibilities, have been withheld by the United States, which proposes to exercise over them, and is exercising over them, the "municipal sovereignty" which the supreme court of the United States in Pollard's Lessee v. Hagan declared not to exist. If at the time of the proposed cession of its lands by Virginia, Congress had declared its intent to be that which it has actually executed in the state of California, little doubt can be entertained as to the answer which Virginia would have made. It is indeed a departure from the accepted construction of these constitutional provisions to have it said that the United States may, as here, withdraw from state use one-third of the area of a sovereign state, forever deny to the state the sovereign power of taxation and control over these lands, and develop and exploit them under its own rules and regulations for the enrichment of its own treasury."

[48] In fact the Supreme Court of the United States in the case of Light v. United States (1911), 220 U. S. 523, 31 Sup. Ct. Rep. 485, 55 L. Ed. 570, has already intimated that congress may, in the fullness of its power of disposal over the public lands, and acting for the nation as proprietor and owner, withhold from sale and settlement and place in a state of permanent reservation such lands as it may, in the exercise of its discretion, deem necessary for national and public purposes.

[49] The fact that these problems are largely social and economic and are tendencies represented on the one hand by advocates of "collectivism" or "advanced socialism" as opposed to the more conservative

Digitized by Google

ment which was not within the contemplation of its framers, but which policy its proponents contend, with considerable reason, can be more satisfactorily and efficiently administered through national rather than state control.[50]

Wm. E. Colby.

Berkeley, California.

"individualists", was presented in a clear analysis of these opposing views by Judge Curtis H. Lindley in April, 1910, at a meeting of the San Francisco Bar Association in an address entitled "Conservation of Natural Resources and its possible Effect on Mining, Irrigation and Hydro-Electric Industries". He said:

> "It is manifest that we are on the eve of a new dispensation, a new order of things, and that it is time we should examine into the prospective operation of these 'policies' when crystallized into statutory enactments at the hands of the national legislative body. . . . . The subject is a monumental one; presenting, in my judgment, some of the greatest problems which are to be solved by the present generation of lawyers, judges and constructive statesmen."

[50] Hon. Walter L. Fisher, when secretary of the interior, had the following to say on this general subject:

> " . . . . the ordinary citizen of these [western] states—are not at all concerned over Federal usurpation or unjust treatment. They recognize that the Federal Government has full legal power to dispose of the public domain as wise policy may direct.
>
> "They do not fear Federal usurpation, but seek Federal co-operation in supplementing State and local powers, so that the natural resources shall be utilized for the public benefit primarily of the locality in which these resources are situated, and thus ultimately for the benefit of the Nation as a whole. They suspect that the real purpose of those who urge the turning over of the Federal domain to the States is that they may escape the longer and the stronger arm of the Federal Government and may take advantage of the more limited resources and governmental facilities of the individual States. While some States have undoubtedly wisely conserved certain of the lands and natural resources turned over to them by the Nation, the story has too often been the acquisition of these lands and resources by special interests or individuals without adequate recognition of the public interest. There is no policy which it would be wise for any State to adopt with respect to these matters in the adoption and enforcement of which it can not be supplemented and assisted rather than retarded by the retention in Federal hands of the powers and the property now held by the Nation. It is precisely this policy of practical co-operation which should be put into effect.
>
> "There is no real conflict between the Nation and the States upon this subject. In fact, there can be no real solution of these aspects of the problem until the interests and the functions of the Nation and the States are co-ordinated and they are working together for the same essential ends." Report of the Secretary of the Interior (1912), pp. 20-21.

Digitized by Google

The Freedom of Neutral Commerce

THE freedom of neutral commerce and the principles upon which it rests are of great importance at the present time to all neutral states, and especially to the United States, the neutral with the largest commerce affected unfavorably by the regulations which have been proclaimed by the belligerents in the present war.

The struggle of neutrals with belligerents to secure the freedom of their trade is as old as the modern European states themselves. Some of the earliest of the regulations touching the matter are to be found in the Consolato del Mare, a collection of sea laws published in Barcelona in the fourteenth century. The origin of these laws was most probably on the shores of the Mediterranean, where they had developed out of the commercial intercourse carried on among the cities.

The principle of the Consolato del Mare which related to the freedom of neutral commerce was that of spare your friend and harm your enemy. If a belligerent found the goods of his friend on an enemy's vessel, these goods would be free from confiscation though the vessel itself was liable to condemnation as good prize, while the goods of an enemy found on a neutral vessel were liable to capture and confiscation. In course of time this principle of the Consolato made its way to the maritime states outside of the Mediterranean, where it was accepted by England and became the English practice until the Declaration of Paris in 1856.

The French, who were the great rivals of the English upon the sea, did not accept the principle of the Consolato but at first adopted the doctrine of hostile infection or contagion. In accordance with this doctrine if the ship was hostile, the goods of a neutral on board were infected with a hostile character and were liable to seizure and confiscation, and if a neutral vessel was found carrying enemy's goods, the vessel became liable to capture and confiscation as well as the goods.

This doctrine, if carried out by belligerents, would restrict neutral trade in time of war to neutral ships carrying neutral goods. It was too severe and a modification of it, first put forward by the Dutch, was subsequently accepted by the French. This modification was expressed by the phrase "free ships, free goods; enemy ships, enemy goods", and was followed by France

Digitized by Google

until the Declaration of Paris referred to above. By this practice the character of the flag was made the determining factor as to whether or not the goods were liable to confiscation.

Many treaties modifying the doctrines held by England and by France and the states which followed respectively their leadership, were entered into in the course of the seventeenth and eighteenth centuries, but in the absence of treaty stipulations to the contrary, these were the principles enforced. Through the war with her North American colonies, England became involved in a war with France and Spain, in the course of which her treatment of neutral commerce led to the formulation, by Catherine of Russia, of certain principles for the guidance of Russian merchant vessels, and to the formation of a League of Armed Neutrality, to which practically all of the continental powers and the United States gave adhesion, to enforce the following principles which had been put forth by the Russian government:

1. That neutrals should have the right of trading freely from port to port and along the coasts of belligerents.
2. That free ships make free goods, except contraband.
3. That contraband is limited to articles of immediate use in war.
4. That a port is blockaded only when there is evident danger to an entering vessel from vessels of the attacking power stationed sufficiently near.

These rules were not accepted by Great Britain and following the peace made in 1783, they were soon deserted by other states, Russia among the first.

In 1800 a Second League of Armed Neutrality was formed which proclaimed the same principles and the additional one that a neutral vessel under convoy of a warship of its own country should be free from molestation. The Napoleonic era was one in which scant regard was paid to the rights of neutral commerce. Great Britain in her Orders in Council, and Napoleon through the Berlin and Milan decrees, utterly disregarded the freedom of neutral commerce. Paper blockade and confiscation for trading with the enemy were made the basis for an almost complete destruction of the commerce of the United States. Repeated protests on behalf of the United States went unheeded and non-importation and embargo acts produced no effect upon the conduct of the belligerents and resulted only in further injury to American commerce. When Napoleon was finally overthrown, and the congress of representatives of the European powers assembled

Digitized by Google

at Vienna to readjust the boundaries of Europe and to re-establish the state order which had been so sadly disarranged, no steps were taken for the protection of neutral commerce, and until the Crimean War England held to the doctrine of the Consolato del Mare and France to that of free ships, free goods, enemy ships, enemy goods. When these two states found themselves allied in that war it was necessary for them to arrive at some agreement in the treatment to be accorded to neutral commerce and accordingly a compromise was effected between the two opposing doctrines. France dropped the doctrine of enemy ships, enemy goods, and England accepted the principle of free ships, free goods. At the close of the war representatives of the powers met at Paris and agreed to certain rules for the regulation of maritime warfare known as the Declaration of Paris, and from that time on the following principles were accepted as a part of international law:

1. Free ships make free goods, except contraband.
2. Neutral goods, except contraband, on enemy ships are not liable to confiscation.

It was further agreed that a blockade to be binding must be effective; that is, that it must be maintained by a force sufficient to prevent access to the port or coast of the enemy. It was no longer required that the vessels should be stationed before the harbor as was proclaimed in the League of Armed Neutrality. This change was due to the introduction of steam power which enabled vessels cruising backward and forward to cover a far larger radius of territory and much more effectively than in the old days of sailing vessels. From 1856 until the present war no question has been raised with respect to the validity of these rules as a part of international law.

There has been a constant struggle between neutrals and belligerents, the former seeking to remain as unaffected by the war as possible and the latter seeking to put pressure upon the enemy through interrupting its trade. The neutral claim to be allowed to carry on trade as freely in time of war as in time of peace has been subject only to the restrictions which have been allowed the belligerents for the furtherance of their aims; these restrictions have been limited to contraband, blockade running and unneutral service, and the right of visit and search as necessary to enforce the rules applicable to them. International law has not placed upon neutral states the obligation to prevent their citizens from engaging in carrying contraband or running blockades, or from performing unneutral services, but in each of these cases it has

Digitized by Google

granted to the belligerent the right to prevent the acts in question through the exercise of the right of visit and search, followed by capture and condemnation by the prize court in the three cases indicated.

The sole object of the right of visit and search is to afford the belligerent the means of determining (1) the character of the vessel, for enemy vessels upon the high seas are liable to capture and confiscation, and the enemy character of a vessel cannot be established without the exercise of the right of visit and search; and (2) whether or not the vessel is carrying contraband, is attempting to run a blockade, or is engaged in unneutral service.

The right of visit and search, with the examination of the ship's papers and cargo, must be carried on with the least possible inconvenience and delay to neutral vessels. If the examination of the papers and cargo leads to the conclusion that the vessel is engaged in any one of the three forbidden classes of acts, it may be taken into a port of the captor and there brought before a prize court for condemnation. A mere suspicion, unsupported by irregularities in the ship's papers, or by the character of the goods, or the service in which the vessel is engaged, is not sufficient to warrant the detention of the vessel, and previous to the present war consignment of goods to a neutral port "to order" has never been considered a suspicious circumstance.

One of the difficulties of every system of law is the fact that it is not always in harmony with the actual conditions, due to the fact that conditions are constantly and rapidly changing, while laws change by a slow and tedious process. The rules developed in the days of sailing vessels are ill adapted for the guidance of vessels in the days of submarines, and the examination of the cargo of the largest sailing vessel was a matter of great ease in comparison with the examination of the cargo of the seafaring monsters of today. Because of the difficulty of examining the cargo at sea, the English have asserted the right in certain cases of taking vessels into port in order that a thorough examination of the cargo might be made. Against this course of conduct the United States government has raised its protest, and while the protest may have been well founded because of unnecessary delay imposed upon the vessels, it by no means follows that the fundamental right of visit and search for the purpose of determining the character of the vessel and its cargo, will not justify the taking of vessels into port when there is fair ground for suspecting that a right of capture exists.

Digitized by Google

Hugo Grotius in his famous work on the Laws of War and Peace, published in 1625, divided all goods into three classes: those primarily of use in war, those of use both in war and in peace, and those of no use in war. Goods of the first class when bound for a hostile destination were declared to be absolute contraband and liable to seizure by a belligerent anywhere upon its voyage after it had left neutral territorial waters. Goods of the second class were called conditional contraband and were held liable to seizure only when bound directly for the use of the army or navy of the belligerent. When bound for the use of the peaceful or civil population, they were not liable to confiscation. Goods of the third class were never contraband and so never liable to seizure and confiscation. The English and American practice has always accepted this classification, and it was embodied in the Convention adopted by the London Naval Conference.

At the time of the American Civil War, after the blockade of the Confederate ports had been proclaimed, a very active trade sprang up between British ports and ports of the West Indies, Cuba and Mexico. This trade consisted in articles of every sort, but a large part of it was in articles contraband of war. Neutral vessels sailing from a neutral British port for a neutral destination, would, under ordinary circumstances, be regarded as free from molestation, but it soon became apparent to the United States government that the goods thus carried were reshipped in the neutral ports into swift blockade runners, in the hope of landing the goods in Confederate ports and there securing rich profits.

The difficulty in capturing these vessels engaged in running the blockade was almost insuperable and so the United States government seized certain vessels bound from a British home port to another neutral port on the ground that these vessels were carrying goods contraband in character, the ultimate destination of which was a hostile port, or else they were carrying goods, the ultimate destination of which was a blockade port, and upon the ground that the voyage was a continuous one from the neutral British port to the Confederate hostile destination or port, the capture of the vessels and the confiscation of the cargo were upheld.

This doctrine of continuous voyage was strenuously objected to by the British press and public at the time, although the government itself refused to make any protest against the action of the United States government and at the time of the Boer War the executive department of the British government ordered the seizure of three German vessels, the General, the Herzog and the Bundes-

Digitized by Google

rath, on the ground that they were carrying contraband to the Boers. The vessels in question were bound to Delagoa Bay, a Portuguese possession in East Africa, where a railroad ran direct to the South African Republic. Subsequently the vessels were released because they were not carrying contraband, but the only justification of their seizure was on the ground that the ultimate destination of the goods was hostile.

The object of a blockade is to put pressure on the enemy and it may be of a particular port or place, or of a stretch of coast as in the Civil War when the entire Confederate sea coast was declared under blockade. A blockade to be binding must be effective and the effectiveness is a matter of fact. Furthermore a blockade must be proclaimed by proper authority and notice of its proclamation must be conveyed to neutral powers. This notice should contain the limits set to the area blockaded.

The first and second Hague Conferences did not attempt to formulate rules respecting trade in contraband and blockade running, but at the London Naval Convention in 1909 a set of rules was drawn up covering, among other things, trade in contraband, blockade running and unneutral services. The London Naval Convention was called as a result of an adoption by the second Hague Congress of a Convention Relative to the Establishment of an International Prize Court. In this convention it was stated that in the absence of treaty provisions governing a case, the court should give judgment in accordance with the general principles of justice and equity.

The London Naval Conference, composed of representatives of the ten most important maritime powers, was called by Great Britain to formulate rules to be applied by the international prize court, but the rules agreed upon at the conference were never ratified by the powers, and in the present war the United States has taken the position that we are remitted to the rules of international law as they stood before the war began irrespective of the action of the conference, while Germany has declared that she will abide by the rules formulated by the conference if her enemies will do likewise. England, however, has accepted the results of the conference only with modifications.

The conference accepted the doctrine of continuous voyage developed by the United States during the Civil War in so far as it applied to absolute contraband, which, accordingly, is liable to seizure anywhere upon the high seas if its ultimate destination is a hostile port. Great Britain, then, is clearly within her rights

Digitized by Google

in seizing all vessels carrying absolute contraband if the presumption of an ultimate hostile destination is clear. Each case must necessarily be judged on its own merits and one of the most important circumstances indicative of the real destination of such goods is whether or not they could be utilized in the ordinary course of trade in the port to which they are immediately bound. It is well to remember that at the time of the Civil War the United States was vehemently accused of seizing vessels upon the high seas merely upon the suspicion that the ultimate destination of the cargo was a hostile or blockaded port.

It has been the universally accepted view with respect to conditional contraband that it is liable to seizure only when bound directly for a hostile port and for the use of the army or navy, or a department of government, of the belligerent. Therefore the doctrine of continuous voyage is not applicable to it. Food stuffs are conditional contraband and are not liable to capture on the way from one neutral port to another neutral port, even though the ultimate destination be hostile, nor on the way to a belligerent port unless for the use of the army or navy or a department of government. On no principle involved in the conception of contraband could Great Britain legitimately interrupt trade in food stuffs between the United States and neutral ports. She was, therefore, finally forced to declare a blockade of all the German ports and coasts.

The essential elements of a blockade are notification and effectiveness. The notification that a blockade has been established must be conveyed to all neutral states, and this notification must contain a statement of the area to be blockaded. The English proclamation of blockade may be criticized from its failure to state with sufficient clearness the area within which it proposes to make the blockade effective.

The effectiveness of a blockade is a matter of fact to be determined by a prize court. The element which enters primarily into the question of effectiveness is that of the danger to which a vessel attempting to run the blockade is subjected by the vessels of the blockading power. Formerly it was regarded as necessary for the blockading vessel to be stationed before the blockaded port. This we have seen was in the Declaration of Paris no longer regarded as necessary, and the introduction of mines, submarines, and aeroplanes has changed materially the conditions surrounding the maintenance of a blockade and has led to a con-

Digitized by Google

sequent enlargement of the area of the operations of the blockading vessels.

A blockade of a neutral port is not permissible, for blockade is a war measure and the right of interference with neutral trade is strictly limited. To blockade a neutral port would be the equivalent of an act of war. The blockade which England has proclaimed cannot lawfully interfere with neutral commerce to neutral ports, unless it can be shown that the ultimate destination of the goods or vessels is a blockaded port, or that the goods are absolute contraband.

Unneutral service is rendered by a neutral vessel to a belligerent when it engages in some special service for the belligerent, as in transporting troops, in carrying despatches and other like acts. In all of them the service must be specially done, and generally it entails something out of the ordinary course of business of the neutral vessel, and frequently the putting of the neutral vessel under the control and at the disposition of the belligerent. For such services, the neutral vessel is liable to capture and condemnation at the hands of the other belligerent.

One of the most serious menaces to the freedom of neutral commerce which has arisen in the present war is the proclamation by Germany of a war-zone embracing the waters around Great Britain, including the whole English Channel and the warning to neutral vessels that within this area they are liable to destruction, since all enemy vessels are to be destroyed, and since it may not be possible to determine in advance the neutral character of the ship. The reasons assigned for this inability were the alleged misuse of neutral flags by British vessels, and the arming of merchant vessels. This last rendered visit and search by submarines impossible, and therefore all merchant vessels within the war zone were liable to immediate destruction.

The United States government very properly protested in vigorous and almost sharp terms against such a course, and gave notice that Germany would be held responsible for the loss of any American lives or property, through the carrying out of this unjustifiable course. To both sides the government has made it plain that acts of retaliation of the belligerents upon each other must not be at the expense of the neutral rights, and the freedom of neutral commerce.

Edward Elliott.

Berkeley, California.

Digitized by Google

Law Reform in California

A froward retention of custom is as turbulent a thing as an innovation, and they that reverence too much old times are but a scorn to the new. Bacon's Essay, "Of Innovations", quoted in Broome's Legal Maxims.

"WHAT a caption and what a quotation!" remarks the reader. Rubbing his eyes to see whether he has read aright, he conjures up the Railroad Commission Law, the Workmen's Compensation Law, the Blue Sky Law, the Corrupt Practices Law, the Direct Primaries Law, and other laws that are progressive or radical according to one's point of view. Then he smugly declares that California leads the country in up-to-date laws, as well as in education, material resources and climate. Now that the times that tried men's souls in the fight against the invisible government are over, the honest citizen will hear no more about laws and reforms. "A plague on both your houses", is his sentiment. And if one be so bold as to assert that in matters of consequence to every man who has a contract to be drawn or a civil suit to be litigated, the laws of California are sadly out of joint with the times, he is apt to be asked to prove his assertion by resort to ordeal or trial by battle, rather than be invited to give a bill of particulars. Nevertheless, despite the unfavorable dramatic background, as it were, I am going to have the hardihood to call attention to what seems to me the need in thoroughgoing reform, in the branches of the law governing business relations, property rights and civil procedure.

It will perhaps be a mild surprise to lawyers to be told that the need for law reform is greater in California than it is in almost any state in the Union. Generally speaking, the problem of American law reform is a problem of reform of procedure, a simplification in the machinery of the administration of justice. It is only the uninformed both in and out of the profession, that regard the law as a body of hard and fast rules. As Justice Holmes of the United States Supreme Court, probably our greatest American jurist, said a few years ago

Digitized by Google

in a characteristic passage:[1] "I thought it dangerously near a platitude to say a dozen years ago that the law might be regarded as a great anthropological document. . . . . Any man who is interested in ideas needs only the suggestion that I have made to realize that the history of the law is the embryology of a most important set of ideas, and perhaps more than any other history tells the story of a race. . . . . An argument that would have prevailed in Plowden's time and perhaps would have raised a difficulty to be gotten rid of in Lord Ellenborough's, now would be answered with a smile." Indeed the flexibility of the common law, (and in the common law I include the principles of the equity jurisdiction), is such that while the courts necessarily lag a little behind the advanced thought of the country, the law is dynamic and adapts itself to changing conditions. "The law should follow business", said an eminent English judge.[2] This flexibility may be called the genius, as it is the grandeur, of Anglo-American law. Occasionally, however, social and economic conditions change so rapidly that the courts are not able to keep apace. The old bottles will not hold the new wine. Legislation then becomes necessary to prevent maladjustment. We have recently had a striking illustration of this in the inappropriateness of the common law rules of fellow servant and assumed risk to the conditions of modern industry. In England and many of the great states of this country, including California, this vexing situation has been dealt with by well-considered legislation. But such situations are rare and unusual. So in most states few, if any, sound lawyers would advocate a general overhauling of that great body of rules of conduct enforced in the courts, which represents the crystallized judgment of the ages,—although Maitland thought that the English law of real property was a century behind the German. Why is the situation different in California? Because some forty years ago the State of California attempted to reduce the common law to writing by adopt-

[1] 1 Continental Legal History Series, pp. xlv-xlvi.

[2] Bigelow, Bills, Notes and Cheques, 2nd ed. 'Law' then 'should follow business'. In these words the author quotes a serious remark made to him by the late Lord Bowen, in a conversation concerning the decision of the Court of Appeal in the great case of the Mogul Steamship Co. v. McGregor (1889), 23 Q. B. D. 598 (affirmed [1892] A. C. 25), in which his Lordship (then Lord Justice Bowen) had just delivered his well-known opinion. The words quoted, it is confidently believed, contain the very substance of sound legal theory.

Digitized by Google

ing a so-called "civil code", which was halt and lame at the time, and by the march of events has become obsolescent.

A moment ago I suggested that the general problem of American law reform consisted in meeting a demand for the reform of procedure. This is by no means a universal problem, but it is a problem that California shares with most American states. In this respect California lags behind Kansas and Missouri, not to mention Connecticut and New Jersey. So much has been written in these last few years about reform of procedure, that he who runs may read. I shall accordingly dismiss this part of the subject summarily. England led the way about fifty years ago. The principle of the English legislation was that instead of enumerating rules to cover every situation that the draftsmen could foresee, which is the theory on which the California Code of Civil Procedure is framed, the statute should state only the general principles underlying the law of procedure, and the details and minutiae of practice should be left to be regulated by rules of court. Kansas has the distinction of being the first American state to adopt the English system. New Jersey has followed suit, as has Ohio in the Cleveland Municipal Court Act, and the United States Supreme Court in prescribing the New Rules in Equity for the Federal Courts. Professor Pound of Harvard University, an expert on law reform, has summarized the advantages of the English system over the "code practice" as it prevails in states like California, as follows:[3]

> "(1) The exact workings of a detailed rule of practice cannot be anticipated and as change and adaptation to the exigencies of judicial administration are inevitable this change and adaptation should be left to the judges who are best qualified to determine what experience requires and how rules are actually operating.
>
> (2) The opinion of the bar as to the working of a rule may be made much more effective where the details are to be settled by the judges through framing new rules or improving old ones than where the legislature must be applied to. The judges are necessarily better able to judge how far complaints are well founded, how far they represent the sentiment of the bar generally and not that of one or two disappointed practitioners, and they know better whose opinions are entitled to weight and whose not in matters of procedure.

---

[3] 76 Central Law Journal 211.

Digitized by Google

(3) Experience has shown that small details of procedure, which sometimes are very irritating in their effects, do not interest the legislature so that it is almost impossible to correct them by enactment.

(4) In state legislation with respect to procedure it has very often happened that details in which some member of the legislature has a personal interest are made the subject of enactment under circumstances where there is no real advantage to procedure.

(5) Above all, there ought to be a possibility of speedy adjustment of the details of procedure to the exigencies of administration. Only rules of court can bring this about."

Coming now to the consideration of the California Civil Code, let us first glance at its history. In the early part of the nineteenth century there lived in England, a polemist named Jeremy Bentham, who made terrific onslaughts upon the common law. He berated it as irrational and unscientific, and saw the remedy for all its alleged shortcomings in codification. Bentham was ignorant alike of the principles of historical criticism and legal philosophy, and was equally ready to draw a code gratis for the English crown, the President of the United States or the Gaekwar of Baroda. Bentham's ideas met with scant response among the hard-headed English lawyers, and he turned to the United States. First he offered President Madison to draw a code for the United States gratis, but Madison, being a good lawyer, would have nothing to do with the proposal. Bentham then made a similar offer to the Governor of Pennsylvania, which was submitted to the Pennsylvania legislature and rejected. He then addressed a circular letter to the governors of all the states, but without results. Finally in 1817 he wrote and distributed a pamphlet entitled "Jeremy Bentham, an Englishman, to the citizens of the several American United States" in which he made the most astounding claims for his proffered code. "Accept my services in the book of laws, my friends", he wrote, "and so long as the United States continue the United States, among you and your posterity, in every such accepting State, shall every man, if it so please its appointed legislators, find, for most purposes of consultation, his own lawyer; a lawyer, by whom he can neither be plundered or betrayed. Accept my services; no man of tolerably liberal education but shall, if he pleases, know more—and without effort—much more, than at the end of the longest course of the intensest effort it is possible for the ablest lawyer to know at present."

Digitized by Google

Bentham's propaganda had no immediate results, but the evil that he did lived after him. In the middle of the century there was a strong movement in the United States for codification along Benthamite lines. In 1849 the New York Constitution commanded the legislature to appoint commissioners to codify the law. The next year an attempt was made to start off the new State of California as the first common law jurisdiction with a civil code. It failed, the committee appointed to look into the project reporting:[4]

> "We know it to be a favorite theme of some men that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be and ought to be, reduced within the compass of a common sized spelling book—so that every man might become his own lawyer and judge—so that the farmer, the artisan, the merchant, with his *vade mecum* in his pocket at the plough, in the workshop, or in the counting-house, might be enabled, at a moment's warning, to open its leaves and point directly to the very page, section and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the chimeras of ignorance and folly, or the fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly conjoined. . . . To undertake by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man must forever remain equally impracticable and absurd. In truth, all the provisions of constitutions, and statutes and codes are but pebbles on the sea shore—the vast ocean of legal science lies beyond."

About 1857 the New York Code Commission, made up of three lawyers in active practice, was created. The most prominent of the commissioners was David Dudley Field, a leader of the bar, but an avowed disciple of Bentham. The commissioners worked upon the draft of the proposed "civil code" intermittently for about eight years, when they reported to the legislature the convenient *vade mecum* that they claimed would dispense with law libraries, and for most purposes make a man his own lawyer.

---

[4] See 1 Cal. Rep., appendix.

Digitized by Google

These specious claims appealed to the uncritical legislature, and the code was adopted. About that time the New York bar awoke to what had happened, and prevailed upon the governor to veto the law adopting the "civil code". The legislature was not able to override the governor's veto. Thus might have ended the first attempt to codify the common law in America, had not the Territory of Dakota, where distances were great and law books scarce, seized the opportunity and adopted the New York draft Civil Code verbatim. A few years later—in 1872—California adopted the same code with some changes, few of them very radical, except a number relating to the law of husband and wife, for which the Spanish law was largely drawn upon. Broadly speaking the New York draft Civil Code remains substantially unchanged, and is the basis of a great body of the private law of the State of California.

What kind of a code was this New York draft Civil Code? Clearly its foundations were insecure. But may it not, like the image of Nebuchadnezzar, have had a gold head along with its feet of clay?

Several years ago I visited a session of the Judicial Committee of the Privy Council in London. It was as tiresome as only an English court of appeal could be. Being restless, but reluctant to leave, my eye wandered about the room, and I spied a copy of Pollock's Indian Contract Act within easy reach. Being unfamiliar with the book, I proceeded to read the preface. My attention was almost immediately arrested by the following:[5]

> "Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from *the draft Civil Code of New York, an infliction which the sounder lawyers of that state have been happily successful so far in averting from its citizens. This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced.* It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything, than the average badness of the whole—were most unfortunately adopted in the Indian Con-

[5] Pollock's Indian Contract Act, 3d ed., p. ix.

Digitized by Google

> tract Act. Whenever this Act is revised *everything taken from Mr. Dudley Field's code should be struck out,* and the sections carefully recast after independent examination of the best authorities."
>
> (The italics are mine).

I might rest here, but I prefer to make my criticisms more pointed, although in a popular article and with the limited space at my disposal, I cannot hope to do more than touch the high places. Let me first enumerate the counts in the indictment. They are: (1) The arrangement is defective; (2) No provision is made for growth; (3) The draftsmanship is bad; (4) The principles of the common law are often misapprehended.

Taking up these counts in the order given:

(1) *Arrangement.* A little over a year ago Professor Sherman of Yale University in an article on codification remarked:[6]

> "Almost at the very outset of the nineteenth century revival of Roman Law study, Sheldon Amos published in 1873 his 'English Code', in which he laid down the essential principle of English law codification, namely accurate classification—the rock on which the hopes of David Dudley Field and the movement toward codification started by him were wrecked. . What a pity Field did not try to make a thorough use of Livingston's magnificent work so full of accurate classification—the famous Louisiana Code!"

But what difference does it make whether the arrangement of the code is systematic or hap-hazard? To say nothing of leading to confusion in statement, defective arrangement makes it next to impossible to find many provisions of the code. There are not a few decisions of the Supreme Court on matters covered in the code which do not refer to the pertinent code provisions, and some of the decisions are at variance with the code. This of course means uncertainty, not to say confusion. It also means that in litigation important enough to go to the Supreme Court, attorneys on both sides, as well as the trial and appellate judges, have not found the controlling code provisions. More than that, it means that a lawyer, trying to pilot his client in advance of trouble, must occasionally have a haunting fear that he may have given counsel at variance with the law as laid down in the code. The results may be serious, but they are sometimes ludicrous. A lawyer friend told me the other day of a case before the Supreme Court some few years ago, in which counsel, upon having it suggested to him

---

[6] 25 Greenbag 460, at p. 461.

Digitized by Google

from the bench that there were decisions contrary to his contention, called attention to a plain provision of the code which had been overlooked in the decisions referred to. One of the justices is said to have replied: "What you say is true enough, but we have disregarded that provision so long, that if we were to follow it now titles would be disturbed." And this is the code that was going to make the law understandable to the layman without the luxury, or the infliction, of a lawyer.

(2) *No provision for growth.* As has already been suggested, the law is an "anthropological document". The law as it is today and as it was forty years ago are radically different. It is perhaps not too much to say that the methods and researches of Sir Henry Maine, Professor Maitland, Sir Frederick Pollock, Professor Dicey and Mr. Justice Stephen, in England, and of Mr. Justice Holmes, Professor Langdell, Professor Ames, Professor Thayer, Professor Wigmore and Professor Pound, in this country, have almost revolutionized legal thinking. Whole topics have grown up that were almost unknown forty years ago. A good illustration is found in the law of what is now called "quasi contract", the cardinal principle of which was laid down by the great Lord Mansfield about a century and a half ago, as being the duty to account for money or property that in equity and good conscience belongs to another. This topic, although it had been developed by the Roman jurists centuries ago, and was systematically covered in the Code Napoleon, lay fallow in our law until about thirty years ago, when it came under the fructifying influence of Professor Ames and his disciple, Professor Keener. It has recently been re-expounded in an able treatise by Professor Woodward, of Stanford University. What says the Civil Code of California, as amended up to 1913 upon the subject of quasi contract? It is hard to know, but this much is certain, the code does not attempt to give a systematic statement of that branch of the law. There are, however, two sections attempting to generalize on the subject,[7] which have, apparently, never been discovered by

[7] Cal. Civ. Code, §§ 1712-1713. See note New York draft Civil Code, (1865) p. 266. Compare California Code provisions with provisions of Indian Contract Act, §§ 68-70; Jenks' Digest English Civil Law, §§ 707-721; French Civil Code, Wright's Eng. translation, §§ 1370-1381; Louisiana Civil Code, §§ 2292-2314; German Civil Code, Wang's English translation, §§ 812-822; Institutes of Justinian, Moyle's translation, Title XXVII; see also Sohm's Institutes of Roman Law, Ledlie's English translation, 2nd ed., pp. 423-431.

Digitized by Google

the bar or the courts of review of this state, or of the states of Montana and North and South Dakota, which have the same code. In forty years these sections of the civil codes of four states have, it seems, not been cited once in any court of review! I might add that I know that these sections deal with quasi contract because the draftsmen of the draft New York Civil Code from which they are taken *verbatim* say so by indirection in notes appended to the sections. Otherwise I am not at all sure that any uninitiated person could fathom their purport.[8]

It might be suggested with some warmth by worshippers at the shrine of the god of things as they are, "How do you expect codifiers to look forty years ahead of the times?" Frankly, I do not; but is that the end of the matter? By no means. The real suggestion lies in this, that the code should not be deemed the final word of wisdom, but should contemplate, and make provision for growth. This can be done by establishing a permanent commission of lawyers to report needed changes in the code to the legislature at each session. The French did this over a century ago when they adopted the Code Napoleon. Can we not, with profit, establish such a commission?

(3) *Draftsmanship defective.* If Macaulay's justly celebrated schoolboy had worked in a law office for six months he probably would have been well aware that only the bungling amateur and the testatrix who draws her own will, enumerate in a contract or will when a matter can be covered in general terms. Why? Because the enumeration may not be sufficiently extensive. Courts have acted upon this principle since time when the memory of man runneth not to the contrary. For example, courts of equity have refused to define fraud for fear that some crafty scoundrel might devise a new species of fraud and circumvent the definition. The civil code constantly violates this principle. For example, it enumerates the instances when "trusts" may arise, though "trusts" were invented to prevent fraud, and that is still the office of the "constructive trust". There are other defects in draftsmanship; but I must hurry on to the next point.

(4) *Misapprehends principles of common law.* When the New York legislature created the Code Commission, it enjoined the commissioners to codify the common law with such modifications as occurred to them. Either consciously or unconsciously, the

[8] New York draft Civil Code (1865), p. 266.

Digitized by Google

commissioners observed the second part of this injunction more religiously than the first. Indeed in many places they did not follow the then prevailing rule of law or any other authoritative statement of the law, and we have slavishly accepted their work. Take for example the rule against restraint of trade. That rule has recently been the subject of exhaustive examination and is fresh in the minds of most of us. It will be recalled that in medieval times the rule was one of absolute prohibition, because the guild system prevailed, and under it, if a man restrained himself by contract from carrying on his business he would probably deprive himself of the means of livelihood, to the injury of himself, his family, and the state. Later when conditions of trade became free, a merchant selling his store in London might restrain himself from carrying on his trade in London but not throughout the kingdom. Why? Because, in the quaint language of the early eighteenth century, if one engages in business in London, what booteth it him that his vendor carry on the same trade in Newcastle? At the present time, inasmuch as business has become national and international in scope, the restraint may extend to the whole world if it is necessary to the protection of the buyer and does not run counter to the public policy aimed against monopolies. This latter application of the rule has been definitely established since the New York draft Civil Code was drawn. The same principle, however, runs through the cases in the various stages of development, namely, that if the restraint is not against the public interest, it is valid to the extent that it is necessary. What says the New York draft Civil Code of 1865, and the *California* Civil Code as amended to 1913? They declare that the ***restraint must be confined within a specified county***. Apropos of this rule, the New York commissioners piously observed:[9]

> "Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. . . . . In Whittaker v. Howe (3 Beav. 387), a contract not to practice law anywhere in England, was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the state of the services of its citizens."

And these views have been transmuted into the law of California. Is not this like harking back to David's sling?

---

[9] New York draft Civil Code (1865), p. 255, § 833.

Digitized by Google

I venture to believe that almost any competent lawyer who takes the trouble to look into the matter will agree with me that our civil code is fatally defective, both in form and content.[10] What is the remedy? Two courses are open: the repeal of the civil code and the return to the common law, or a new code. Powerful arguments might be suggested in favor of the first course, but as a practical matter it is too much to suppose that a generation of lawyers who have grown up under the code will permit its abolition. The force of inertia is too great.

If we are to have a new code, on what principle should it be drawn? Without going into detail, which is obviously impossible here, I might suggest that if the code is going to constitute a working system it must confine itself to the statement of principles, and not try to prescribe rules for every situation that may arise in the varied relations of life. Such is the theory on which the new German and Swiss codes were drafted. If the new code is to be dynamic and not static, it should also make provision for a body of experts to keep it up to date, as is done in France.

By whom should such a code be drafted? It needs no great acumen to perceive that no three or four active practitioners, regardless of their attainments, are equal to the task of reducing the whole body of private law to systematic statement. A code prepared as our present code was prepared is doomed to failure. Even a comparatively small branch of the law cannot be successfully codified by a small committee of lawyers. Some years ago a sub-committee of the Commissioners of Uniform Legislation drafted a proposed Uniform Negotiable Instruments Law, which has been adopted in nearly all the states; not however, in California. This law has not only been a flat failure, but it has also been a source of confusion. On the other hand, a very

---

[10] I take the liberty of suggesting that there is no critique of the civil code to which to refer my learned readers. Those caring for further examples of the inadequacy of the code may look at Sir Frederick Pollock's Indian Contract Act, 3d ed., and the following articles in the California Law Review: The Need of Remedial Legislation in California Law of Trusts and Perpetuities, by Prof. W. N. Hohfeld, written before recent amendments, 1 Cal. Law Rev. 305; The Law Merchant and California Decisions, by Prof. A. M. Kidd, 2 Cal. Law Rev. 377; and Mutual Assent in Contract under the Civil Code of California, by the present writer, 2 Cal. Law Rev. 345. Further examples of decisions inconsistent with plain provisions of the code may be found in an article, Contract Distinguished from Quasi Contract, by the present writer, 2 Cal. Law Rev. 177.

Digitized by Google

satisfactory negotiable instruments law has been enacted in England, but it was the result of the joint labors of one of the highest authorities on the subject working with a select committee of merchants, bankers, lawyers and law lords. When the Commissioners of Uniform Legislation came to prepare the Uniform Sales Law, they profited by English experience and engaged as draftsman Professor Samuel Williston of Harvard University, one of the foremost authorities on the law of sales. Professor Williston made a provisional draft, which was submitted to many lawyers, discussed in committee, and re-drawn several times before it was finally adopted. If such care is necessary in codifying comparatively small portions of the law, how much more so is it in case of general codification?

The greatest code the world has ever seen was adopted in Germany in 1896 to take effect in 1900. The Germans had a problem so difficult, due to the many varieties of law in the empire,—Roman, Canon, Germanic, Danish, French, as well as Austrian and Saxon codes, and what not,—that in comparison our problem seems simplicity itself. The Germans set themselves to their task with the system and thoroughness that characterize all public work in that "nation of damned professors". First a committee of five prominent, practical jurists was constituted in 1873 to plan the work. Next, a committee of eleven of the leading university professors of law and judges was appointed to prepare a provisional draft. The actual work of draftsmanship was assigned to five members of the committee, who worked individually on the branches severally assigned to them for seven years. Then the committee came together and prepared several drafts, which they reported, together with arguments pro and con. These drafts and arguments were printed broadcast, and subjected to the severest professional criticism for several years. A new committee of twenty-two was thereupon appointed, that re-drafted the proposed code in the light of all the criticism and discussion. After twenty-three years of painstaking labor by the finest legal minds in the empire, the civil code was completed,—and it is a little book that any one may easily carry around in his coat pocket.

I am far from suggesting that the drafting of a new civil code that would meet the needs of California would involve anything like the labor expended on the German Civil Code. On the other hand it must not be forgotten, to quote a learned judge of the Pennsylvania Supreme Court, that "Laws seem to be born full

Digitized by Google

grown about as often as men are". If I were asked by a council of elder statesmen to sketch a *modus operandi* for the preparation of a new civil code, I should submit something like this: Let the subject of revision be discussed as widely as possible for the next two years. Let the next legislature create a Code Commission with a life of about four years, composed of judges, law professors, and lawyers in practice. Let the commission be instructed to plan the work, and then engage the best expert talent available to draft the various titles,—men like Professor Williston of Harvard, for Contracts; Professor Mechem, of Chicago, for Agency; Professor Woodward, of Stanford, for Quasi Contracts; Professor Jones, of Berkeley, for Torts; and Judge Lindley for Mines and Waters, if they could be secured. Let the commission be further instructed to then engage the best draftsmen to be had to co-ordinate the various titles and work them into an articulate whole. Let about three years be given to this work. After the draft is prepared, let it be published with explanatory notes and distributed broadcast among the members of the bar, the business community, and the teachers of law. Invite the most searching criticisms. In the light of these, prepare a final draft for submission to the legislature of the following year, that is, six years hence. Let the legislature confine its changes to matters of policy, and leave the details alone. Let the code then be gone over again by the draftsmen, and have it take effect a year later. Then provide for keeping it abreast of the times by creating a permanent commission—with a changing membership—to report biennially to the legislature on needed changes. If this plan were followed the code produced would not, of course, be perfect; but what human institution is perfect?

As a last word let me assure the learned reader that I am not so innocent as to imagine that within the next few years the people of California or the lawyers of California are going to take steps to set their house in order. I must confess to sharing the rather cynical view of an eminent jurist who once observed that there is little hope of law reform to be expected either from laymen or lawyers, because "those who make the shoe do not feel its pinch, and those who feel its pinch do not know how shoes are made".

Joseph L. Lewinsohn.

Los Angeles, California.

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year **Single Copies, 50 Cents**

A. M. KIDD, Editor-in-Chief
J. D. RINEHART, Student Editor-in-Chief

Faculty Board of Editors

WM. CAREY JONES	A. P. MATTHEW
WM. E. COLBY	M. C. LYNCH
M. E. HARRISON	J. U. CALKINS, Jr.

Student Board of Editors

V. M. AIROLA	LYMAN GRIMES
ARTHUR ALLYN	O. F. MONTANDON
J. C. ALTMAN	J. S. MOORE, Jr.
MISS E. B. BROUGHTON	J. B. OLIVER
A. H CONARD	C. R. SALISBURY
T. A. J. DOCKWEILER	E. J. SINCLAIR
G. H. GOBAR	G. W. WORTHEN

EDITORIAL NOTES

THE RECITAL OF FACTS IN JUDICIAL OPINIONS.

WITH something like one million cases reported in the courts of last resort of the United States and the number increasing at the rate of twenty-five thousand a year the problem of finding the law is not without its difficulties. Improved methods of reporting and digesting have up to the present time more than kept pace with the increasing bulk of reports. Yet the day must soon come when the tide of case law will overwhelm the profession. In the meantime we should be duly grateful for every temporary expedient of reporting and digesting that enables us to keep our heads above water.

Digitized by Google

The judges could do much to help by refraining from writing opinions with lengthy recitals of the facts, except where such facts are absolutely necessary for an understanding of the question of law involved. A cynical lawyer once remarked when the decisions of the Supreme Court of his state were praised as accurate statements of the law: "Yes, they read well enough, but you should see the records". We must honor the judge who desires to satisfy the litigants and the profession that the evidence has been fully understood and the decision rendered on the merits. The facts, however, have absolutely no interest to anyone except the parties concerned. Would it not be possible to send a review of the evidence to counsel for the litigants to satisfy them that the court has done its work and spare the profession the recital of details which are of no value whatever as precedents? What possible excuse can there be for the judges rehashing the acrimonious controversies of the consultation room for forty pages in opinion and supplementary opinion as was done by the court of Utah in Harrison v. Harker (1914), 142 Pac. 716, or for the dissenting opinion in the case of In re Brown's Estate (Wash., 1915), 145 Pac. 591, of thirteen pages including a reproduction of the handwriting exhibits, the question in dispute being purely one of fact. Irvin v. State (Feb. 24, 1915), 146 Pac. 453, is a flagrant example of the method of the Criminal Court of Appeals of Oklahoma in giving abstracts of the testimony of each witness.

Frequently, not only are the disgusting details in rape cases given at unnecessary length, but there is added the wanton cruelty of publishing to the world in the reports of the state the name of the unfortunate victim of the outrage. Surely in such cases the innocent child should be referred to as the prosecuting witness. People v. Kilfoil (Mar. 22, 1915), 20 Cal. App. Dec. 508, is an example of the proper treatment of such cases by the Second Appellate District Court. The District Court of Appeal of California for the First Appellate District is rendering a distinct service in handing down memorandum opinions where no question of law is involved.

THE PUBLIC DEFENDER.

IT IS to be hoped that Senator Lyon's bill, (Senate Bill No. 142) creating a public defender will pass. Under the law as it now stands, a defendant without money has very little chance to maintain his defense. He must depend on volunteer counsel, usually the young lawyer just admitted to the bar, who is getting his experience at the expense of his client. Such counsel are at every disadvantage compared with the state which has the resources of the police department and the money to run down the evidence. Who will furnish the money or do the work of investigating for

Digitized by Google

the defendant? The District Attorney, with every intention to be fair, and it is the exception to find a District Attorney who desires to convict an innocent man, cannot appear on both sides of the case, and has therefore no opportunity of ascertaining what the defendant's defense really is. Mr. Justice Stephen, in summing up his experience under the English law, said: "The safeguards which the experience of centuries has provided in our own days are, I think, sufficient to afford considerable protection to a man who has sense, spirit, and, above all, plenty of money; but I do not think it possible to prevent a good deal of injustice where these conditions fail". The advantage of money cannot be entirely overcome, but the office of public defender is perhaps the most effective single means of making "equality before the law" something more than a glittering generality. Against the measure there is no argument presented, except the one of expense. Apparently the experience of Los Angeles, where the office has been created, shows that the public defender actually saves the county money by eliminating delays and useless trials where volunteer counsel waste the time of judges, juries and officers of the court.

The indirect effects of this office in the improvement of the criminal law are worth consideration. The old order of things was to imprison for a definite period persons who had committed a criminal act. Prisons were usually such that the inmates became degraded physically and morally, and if not of the criminal class when entering prison probably became such before their release. After an education in crime they were turned loose to prey on society. In short, under the old system, many were sent to prison who would have done better for themselves and society if they had never been sent there at all, and many were discharged who should never have been let out. The probation and parol systems are bringing about a needed change; but for their effective operation a careful diagnosis of each individual case is necessary. The causes of crime are many. Without a knowledge of these causes there can be no cure. Did the defendant commit the crime by reason of bad associations, weak-mindedness, disease, social conditions, drink, natural perversity or some other cause? According to the answer of the skilled diagnostician will depend the treatment or punishment, call it by what name you please, which will most effectively protect society. The position of the public defender makes him the most efficient of all instruments in putting these principles of common sense into practical operation.

Digitized by Google

Comment on Recent Cases

ANIMALS: KILLING OF DOG: ACTION FOR DAMAGES.—The progress in the evolution of the dog in the last four hundred years from a position of one branded as *ferae naturae* to the respectable status of personal property, has received a severe check at the hands of Judge Kerrigan in the case of *Sabin v. Smith*.[1] The causa causans was a valuable Russian wolf hound, who forgetting himself for the moment entered the defendant's poultry yard, was caught chasing a chicken and shot. The defendant relied on section 3341 of the Civil Code, on the old defense that an Englishman's house is his castle, and on the principle that the law from the earliest days has recognized the right of a man to defend his property against the unlawful act of man or beast.

The owner of the deceased animal, pointing to the omission of poultry in the code section, argued that the legislature intended that a dog might be killed only for worrying or killing of sheep, or angora and cashmere goats. The court held, however, that the provision for such a remedy with reference to sheep and goats cannot be said to deprive the owner of fowls of a similar right where the necessity for the killing is apparent.

Undoubtedly the judge expresses the opinion of the common law, though there are dicta contra,—as, "if the dog merely chases and bites an animal, in order to justify killing the dog, it is necessary to show that he could not otherwise be separated".[2] That the learned judge who wrote the opinion in the principal case looked upon dogs as dogs, is clear by this sentence: "The claim that the dog killed was possessed of a pedigree and had a greater relative value than the fowl injured and that therefore the killing was unwarranted, is without merit". But dogs today are classed with other personal property[3] and one look at a modern stock book would show the place of pedigree and its influence on valuation.[4]

The existing differences in dogs should be considered. With this in mind, and remembering the old adage, "a dog is like a man

---

[1] (Feb. 27, 1915), 20 Cal. App. Dec. 376.

[2] Wright v. Ramscot (1666), 1 Wms. Saund. 84, 85 Eng Repr. 93; In re Ackerman (1907), 6 Cal. App. 5, 91 Pac. 429.

[3] Dodson v. Mock (1838), 20 N. C. 282, 32 Am. Dec. 677; Perry v. Phipps (1849), 32 N. C. 259, 51 Am. Dec. 387; State v. Smith (1911), 156 N. C. 628, 72 S. E. 321, Cal. Pen. Code, § 491.

[4] Citizens Rapid Transit Co. v. Dew (1890), 100 Tenn. 317, 45 S. W. 290, 40 L. R. A. 518, 66 Am. St. Rep. 745; Heiligmann v. Rose (1891), 81 Tex. 222, 26 Am. St. Rep. 804; 1 R. C. L. 1130; Johnson v. McConnell (1889), 80 Cal. 545, 22 Pac. 219.

Digitized by Google

in one respect at least, that is, he will do wrong sometimes and if the wrong is slight and trivial, he does not thereby forfeit his life", there might have been more clemency in the present decision.[5] Here was a pedigreed hound worth $350 shot for a chicken worth perhaps fifty cents. If a man found a cat killing his chickens, no one would question his right to shoot it. But suppose his neighbor's valuable horse crushed one of his fowls, would he have the same privilege? While from the record it does not appear that the defendant was aware the hound was pedigreed, the average person knowing that the Russian wolf hound is unusual in size and noble in appearance, would forbear to shoot.

The general rule of law is that there must be an apparent necessity for the defense, honestly believed to be real, and then the acts of defense must themselves be reasonable,—acts beyond reason being excessive.[6] While it is true that the owner could hardly be expected to stand by and mentally calculate the value of the chickens destroyed and await action until such value approximately equaled that of the dog, nevertheless the reasonable, the natural thing to have done would seem to be something just as effective but less drastic, as for example an action in damages against the trespasser's owner.

L. G.

BOOK ACCOUNTS: OPEN AND STATED ACCOUNTS: STATUTE OF LIMITATIONS.—The rule laid down by the courts of this state in regard to open accounts is that when rendered by the merchant and not objected to by the debtor, the assent of the latter is presumed after the lapse of a reasonable time, and the open account is superseded by the stated account or account rendered. Upon this stated account the merchant may bring an action within the two years prescribed by the statute of limitations.[1] However, after the extension of the statute of limitations[2] on open book accounts to four years by the amendment of 1907, it was the general opinion of the merchants that they could sue upon the account any time within the four years, even though they had rendered accounts to which no objection had been made. This opinion, though it appears to have been well founded upon the decisions in other jurisdictions,[3] was shattered by the decision of our Appellate Court in the case

---

[5] Anderson v. Smith (1880), 7 Ill. App. 354.

[6] Livermore v. Batchelder (1886), 141 Mass. 179, 5 N. E. 275.

[1] Auzerais v. Naglee (1887), 74 Cal. 60, 15 Pac. 371; Kahn v. Edwards (1888), 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141; Hendy v. March (1888), 75 Cal. 566, 17 Pac. 702; Baird v. Crank (1893), 98 Cal. 293, 33 Pac. 63; Mayberry v. Cook (1898), 121 Cal. 588, 54 Pac. 95; Converse v. Scott (1902), 137 Cal. 239, 70 Pac. 13; Atkinson v. Golden Gate Tile Co. (1913), 21 Cal. App. 168, 131 Pac. 107.

[2] Cal. Code Civ. Proc., § 337.

[3] Cross v. Moore (1851), 23 Vt. 482; Goings v. Patten (1863), 17 Abb. Pr. (N. Y.) 339; Buxton v. Edwards (1883), 134 Mass. 567; Johnson v. Tyng (1896), 1 App. Div. 610, 37 N. Y. Supp. 516.

Digitized by Google

of National Lumber Co. v. Tejunga Valley Rock Co.,[4] in which the court proceeded upon the assumption that the account stated superseded and extinguished the original obligation so that it no longer existed as a cause of action.[5]

While this doctrine is not deprived of all of its severity by the recently decided case of *Mercantile Trust Company of San Francisco v. Doe*,[6] yet its scope is modified. The doctrine therein adopted is that the rendering of an account does not necessarily change the character of the items from an open account into a stated account or account rendered. The rendering of the account is only a circumstance which with others may or may not establish an account stated. To turn an open account into an account stated, a statement must have been rendered with a view to ascertaining the balance, and making final adjustment of the matter involved in the account. In other words the effect of the rendering of the account is made to depend upon the intention of the merchant, and that intention is of course a matter of fact to be determined from all the circumstances of the case.

The harshness of the doctrine whereby the original obligation was superseded and extinguished by the account stated, lay in depriving the merchant of his original obligation and in substituting a new contract therefor, when this was opposed to the real intention of the parties. Under the doctrine of the principal case the merchant is still at liberty to render his accounts, and unless in so doing he manifests an intention to arrive at a final determination of the matter involved in the account, he will not lose his right to bring his action upon the original obligation. However, unless the legislature extends the statute of limitations in the case of accounts stated as it has in open accounts, the merchant who renders an account will always be in danger of having it considered as an account stated and hence barred after two years.

T. B. R.

CONSTITUTIONAL LAW: BLUE SKY LEGISLATION: DUE PROCESS: INTERSTATE COMMERCE.—The courts have universally held, in the application of the fourteenth amendment, that no person can be directly deprived of the right to carry on business unless the restriction is justified by the police power. All legislation which is a restraint upon liberty or which deprives a person of property, to be justified under the police power, must secure a recognized social interest.[1] In no case can the personal liberty of a citizen and his rights of property be invaded under the mere guise of police regulation. Wherever the law imposes arbitrary

---

[4] (1913), 22 Cal. App. 726, 136 Pac. 508.

[5] 2 Cal. Law Rev., 50.

[6] (Dec. 31, 1914), 20 Cal. App. Dec. 13; rehearing denied Mar. 1, 1915.

[1] Mugler v. Kansas (1887), 123 U. S. 623, 661, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273, 297.

Digitized by Google

and wholly unnecessary conditions upon a right to maintain a business it amounts to an invasion of liberty and the right of property.[2] The courts have recognized the propriety of protecting society from fraud[3] by requiring peddlers[4] and pawn brokers[5] to take out licenses. They have sustained regulations requiring food to be correctly labelled whether it is the subject of interstate commerce or otherwise.[6] They have justified the exclusion of deleterious substances though introduced from other states, on the ground that such articles are not legitimate subjects of commerce.[7] State inspection laws and quarantine laws have been held valid if reasonable.[8] The same principle has been extended to the protection of game,[9] and to the regulation of insurance companies and banks.[10]

Highly paternalistic in their essence there have been passed in the last few years statutes termed "Investment Companies Acts", more popularly known as "Blue Sky Laws", which are designed to protect the unwary from fly-by-night speculative enterprises. Under these acts a citizen of another state, owning and having stocks and other securities of well-established and salable value is prohibited from selling them in the state unless he first meets the exactions of a law which provides heavy penalties for failure to comply with its provisions. There is a period of time, usually thirty days, before permission is given and then such permission rests upon the discretion of a commission or officer designated. In *William R. Crompton Company v. Allen*,[11] and *Bracy v. Darst*,[12] the courts decided the laws of Iowa and West Virginia unconstitutional on the grounds that they were contrary to the fourteenth amendment and also amounted to an interference with interstate commerce. On the first ground, it would seem that the decisions are correct. Some

---

[2] Ex parte Whitwell (1893), 98 Cal. 73, 32 Pac. 870; citing Ex parte Sing Lee (1892), 96 Cal. 354, 31 Pac. 245.

[3] Plumley v. Massachusetts (1894), 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. Rep. 154.

[4] People v. Russell (1883), 49 Mass. 617.

[5] City of Grand Rapids v. Braudy (1895), 105 Mich. 670, 64 N. W. 29.

[6] Plumley v. Massachusetts, supra, note 3; People v. Marx (1885), 99 N. Y. 377, 385, 2 N. E. 29.

[7] Bowman v. Chicago & N. W. Railway (1888), 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. Rep. 689; License Cases (1847), 5 How. 504, 599.

[8] Savage v. Jones (1912), 225 U. S. 501, 32 Sup. Ct. Rep. 715.

[9] Silz v. Hesterberg (1908), 211 U. S. 31, 29 Sup. Ct. Rep. 10.

[10] Noble Bank v. Haskell (1911), 219 U. S. 104, 31 Sup. Ct. 186; see 25 Harv. Law Rev. 372; see also Otis v. Parker (1903), 187 U. S. 606, 47 L. Ed. 323, 23 Sup. Ct. Rep. 168. See State v. Dodge (1904), 76 Vt. 197, 56 Atl. 983; People v. Gillson (1888), 109 N. Y. 389, holding a law restricting the sale of trading stamps to be unconstitutional.

[11] (1914), 216 Fed. 537.

[12] (1915), 218 Fed. 482. See Alabama & New Orleans Transportation Co. v. Doyle (1914), 210 Fed. 173 declaring the Michigan Investment Companies Act unconstitutional.

Digitized by Google

of the securities affected are of sound value and, considering that the nature of modern finance demands quick sales, any deterrent put upon a sale would cause a paralysis of the business. Hence, it would seem that the fraud and opportunity of fraud are not so great as to justify drastic legislation which impairs the freedom of an individual to buy and sell, as he chooses, legitimate subjects of ownership.

Assuming that the Investment Companies Acts are within the due process clause, the question is next presented as to whether the prevention of foreign individual and corporation owners from selling their securities within the state is an unlawful interference with interstate commerce. In the light of the present development of commerce, stocks, bonds and securities of all kinds may be considered as articles of commerce.[13] Anything which can be bought and sold has been held to be the subject of commerce.[14] The subject matter of commerce includes "things, goods, chattels, merchandise, and persons;"[15] the fact of commerce includes the negotiation of the sale of goods[16] and the purchase of goods between citizens of different states.[17] The negotiation of the sale of goods within the state by a person employed to solicit for them is interstate commerce where the goods are sold with a view to their introduction within the state.[18] The modern tendency is to consider stocks and bonds as analogous to chattels and this puts them within the subject matter of commerce, causing any sale of them within the state, or negotiation for their sale with a view to their introduction to fall within the fact of commerce. Therefore, looking upon stocks, bonds and other securities as subjects of interstate commerce any direct interference with their sale will be an unlawful burden

---

[13] Alabama & New Orleans Transportation Co. v. Doyle, supra, note 12. Things held commerce: sending instruction through the mail, International Text Book Co. v. Pigg (1910), 217 U. S. 91, 30 Sup. Ct. Rep. 481; Lottery tickets, Champion v. Ames (1903), 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. Rep. 321; contracts to introduce goods, Stewart v. Michigan (1914), 232 U. S. 665, 58 L. Ed. 786, 34 Sup. Ct. Rep. 476; Crenshaw v. Arkansas (1913), 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. Rep. 294.

[14] International Text Book Co. v. Pigg, supra, note 13.

[15] McCall v. California (1890), 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. Rep. 881; Champion v. Ames, supra, note 13.

[16] Stockard v. Morgan (1902), 185 U. S. 27, 46 L. Ed. 785, 22 Sup. Ct. Rep. 576; Caldwell v. North Carolina (1902), 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. Rep. 229.

[17] Buttfield v. Stranahan (1914), 192 U. S. 470, 24 Sup. Ct. Rep. 349.

[18] Robbins v. Shelby Taxing District (1887), 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. Rep. 592; see also Schollenberger v. Pennsylvania (1897), 171 U. S. 1, 43 L. Ed. 49, 18 Sup, Ct. Rep. 757. Where there is no contemplation of the introduction of the article interstate commerce is not involved, Ware & Leland v. Mobile County (1908), 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. Rep. 526; Insurance contracts are not subjects of commerce, Paul v. Virginia (1868), 8 Wall. 168; New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495, 34 Sup. Ct. Rep. 167.

Digitized by Google

upon interstate commerce.[19] These laws cannot be sustained on the ground that they are inspection, quarantine or licensing laws,[20] as they set up an arbitrary standard to be fixed by individuals who may prohibit the sale, for a considerable time at least, of securities which they believe may result in loss to the purchaser. As such, they cast restraint on the exchange of commodities which are subjects of a commerce, national in its character, and the right to impose such restraint lies exclusively within the federal power.[21]

The California Investment Companies Act exempts from the commissioner's control all corporations, associations, co-partnerships and companies subject to federal control. Most of the companies selling "Blue-Sky" investments are organized under the laws of foreign jurisdictions or can easily be so organized. If such companies or their agents in the interstate sale of their securities are to be held to be engaged in interstate commerce and thus subject to federal control, the California act in exempting them fails to reach the evil which exists. Assuming this to be true, a possible method of control is suggested. An act might be passed by congress similar in principle to the Webb-Kenyon Act, which would give the state power to prohibit the introduction of securities unless introduced in compliance with the state law. However, this would not eliminate the due process objection.

C. R. S.

CONSTITUTIONAL LAW: RIGHT OF A STATE TO IMPOSE A LICENSE TAX UPON FOREIGN CORPORATIONS: BURDEN UPON INTERSTATE COMMERCE.—In the case of *Albert Pick & Company v. Jordan*,[1] the California Supreme Court has upheld as constitutional the corporation license tax of 1905[2] with amendments thereto, and the corporation license fee prescribed by the political code.[3] A former note in the California Law Review[4] had occasion to consider these statutes and intimated that the former, which imposed a maximum amount of two hundred and fifty dollars, was constitutional but that the latter, with unlimited graduation, was not. Our Supreme Court in upholding both taxes has expressly reversed a former decision of its own upon this question.[5] The

---

[19] Robbins v. Shelby Taxing District, supra, note 18.

[20] Standard Stock Food Co. v. Wright (1912), 225 U. S. 540, 56 L. Ed. 1197, 32 Sup. Ct. Rep. 784; Alabama & New Orleans Transportation Co. v. Doyle, supra, note 12.

[21] Bowman v. Chicago & N. W. Ry. Co., supra, note 7.

[1] (Dec. 15, 1914), 48 Cal. Dec. 559, 145 Pac. 506. Also the case of Melville Clark Piano Co. v. Jordan (Dec. 15, 1914), 48 Cal. Dec. 577, 145 Pac. 516.

[2] 1905 Stats. Cal. 493, and amendments thereto.

[3] Cal. Pol. Code, § 409, subd. 4, formerly § 416, subd. 4.

[4] 2 Cal. Law Rev. 321.

[5] Mulford Co. v. Curry (1912), 163 Cal. 276, 125 Pac. 236.

Digitized by Google

decisions of the United States Supreme Court[6] are reviewed and although the court declares its inability to reconcile them, and is not alone in this respect,[7] there are other courts which find no difficulty in so doing.[8]

The question presented in these cases is the constitutionality of a license tax based upon the whole or authorized amount of capital stock of a foreign corporation engaged in interstate as well as intrastate commerce. The United States Supreme Court held the statutes in the earlier cases[9] unconstitutional as being "for every practical purpose" a property tax upon the corporation's interstate as well as local business. This rendered it repugnant to the commerce clause as well as to the due process clause. In the latest case[10] before that court, which has led the California court to reverse its former decision, the license was considered "strictly an excise tax and not a tax upon property". The court refused to lay down any test as to when a tax would amount to an excise, occupation, or mere privilege tax. Each case "must be decided upon its own facts". Great weight was given by the court to the history and system of taxation laws in Massachusetts as well as to the particular statute itself.

The California license fee[11] resembles the fee imposed by the Kansas statute, there being no maximum limit imposed and the percentages of tax in the graduated scale being about half those of Kansas. The Montana statute seems to be even more drastic with regard to the fees imposed than the Kansas statute. Our license tax,[12] on the other hand, which has since been repealed,[13] was like the Massachusetts statute and even more moderate, the maximum sum being two hundred and fifty dollars. The Idaho statute is still less offensive, imposing a maximum fee of only one hundred and fifty dollars as against two thousand dollars by Massachusetts.

Where the exaction is for the privilege of doing interstate business and for the enjoyment and protection of the laws, it is

---

[6] Western Union Tel. Co. v. Kansas (1910), 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas (1910), 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western Union Tel. Co. (1910), 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280; Atchinson Topeka & Santa Fe Ry. Co. v. O'Connor (1912), 223 U. S. 280, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216; Baltic Mining Co. v. Massachusetts (1913), 231 U. S. 68, 34 Sup. Ct. Rep. 15.

[7] State v. Alderson (Mont., 1914), 140 Pac. 82.

[8] Northern Pac. Ry. Co. v. Gifford (1913), 25 Idaho 196, 136 Pac. 1131.

[9] See cases cited in note 6, supra.

[10] Baltic Mining Co. v. Massachusetts (1913), 231 U. S. 68, 34 Sup. Ct. Rep. 15.

[11] Cal. Pol. Code, § 409, subd. 4.

[12] Corporation Tax Act, 1905 Stats. Cal. 493.

[13] 1913 Stats. Cal. 680.

Digitized by Google

an excise tax. But where it is upon the business itself, or what is the same, aimed at the capacity and ability to do business, it is a property tax. Any graduated tax would therefore seem to be such a tax for it aims at ability and capacity, proceeding upon the principle that the abler can afford to pay more. But this would not condemn all the taxes under consideration as unconstitutional, for the Supreme Court has declared the principle that it will look through form to substance to see what the real effect is.[14] Where it is an excise tax or occupation tax in form only, and its "necessary effect is to burden interstate commerce or tax property beyond the jurisdiction of the state," it is invalid. So if a tax is in form a property tax, but in substance or effect a mere excise or occupation tax, it should be upheld. The principle that where one of two interpretations can be placed upon a statute, the one in favor of its constitutionality, the other against it, the former shall be taken,[15] fortifies this position.

V. M. A.

CONSTITUTIONAL LAW: MASTER AND SERVANT: HOURS OF LABOR FOR WOMEN.—Once more the attack on the constitutionality of a law regulating the hours of labor for women has proved futile. In the face of strenuous objection on the ground that such a law denies to employer and employee liberty of contract as well as the equal protection of the laws, the Supreme Court of the United States, in the cases of *Miller v. Wilson*[1] and *Bosley v. McLaughlin*[2], has sustained the California Women's Eight Hour Law.[3] Prior to 1908 there was much argument and considerable authority[4] against the constitutionality of such an act but in that year the validity of a ten hour law for women was established,[5] and the reduction of the time limit by two hours in the principal cases seems to have been accomplished without difficulty. It is noteworthy that the court, in sustaining the discrim-

---

[14] Galveston H. & S. A. Ry. Co. v. Texas (1908), 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. Rep. 638.

[15] Grenada County Supervisors v. Brogden (1884), 112 U. S. 261, 28 L. Ed. 704, 5 Sup. Ct. Rep. 125.

[1] (Feb. 23, 1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342.

[2] (Feb. 23, 1915), 236 U. S. 385, 35 Sup. Ct. Rep. 345.

[3] 1911 Stats. Cal. 437, amended to include several other classes of occupations, 1913 Stats. Cal. 713.

[4] Ritchie v. People (1895), 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315; Burcher v. Colorado (1907), 41 Colo. 495, 93 Pac. 14, 124 Am. St. Rep. 143, which apparently has not been overruled; People v. Williams (1907), 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130.

[5] Muller v. Oregon (1908), 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; followed in Ohio, Hawley v. Walker (1914), 232 U. S. 718, 34 Sup. Ct. Rep. 479; Ritchie Co. v. Wayman (1910), 244 Ill. 509, 91 N. E. 695, virtually reversing Ritchie v. People, supra note 4; Commonwealth v. Riley (1912), 210 Mass. 387, 97 N. E. 367; Ann. Cas.

Digitized by Google

inatory classification of the statute, which limits the hours of labor of student, but not of graduate nurses, relied not on the citation of cases to maintain its reasoning but on a bulletin of the United States Bureau of Education.[6] What may perhaps be one way of obviating constitutional difficulties is being tried in Oregon, where an Industrial Welfare Commission limits the hours of labor and establishes minimum wage scales for the women in the various industries.[7]

The increasing liberality of the courts is manifested in the decisions regarding the regulation of the hours of labor for men, both in public and private employments. In 1890,[8] the California Supreme Court held that a city ordinance prescribing an eight-hour day on public work was invalid, while in 1904,[9] it did not commit itself on the constitutionality of a similar state law, the question not being directly raised. An example of the exercise of the gradually broadening police power is seen in cases of certain private occupations.[10] The safety of the general public has been regarded as a very satisfactory reason for sustaining such statutes,[11] and now enactments by the legislatures providing for the safety of the employees themselves by guarding against fatigue from long hours of labor are coming to be upheld by the courts.[12]

G. H. G.

CONSTITUTIONAL LAW: RIGHT OF COURT TO ENJOIN COLLECTION OF PENALTIES PENDING DECISION ON CONSTITUTIONALITY OF THE LAW.—It is a well settled rule that rates or regulations of public utilities cannot be imposed by a legislature or commission

---

1912-D, 388, affirmed in Riley v. Massachusetts (1914), 232 U. S. 671, 34 Sup. Ct. Rep. 469; see comment 2 Cal. Law Rev. 405; (nine hours) Withey v. Bloem (1910), 163 Mich. 419, 128 N. W. 913, 35 L. R. A. N. S. 628; People v. Kane (1913), 139 N. Y. Supp. 350; (eight hours) State v. Somerville (1912), 67 Wash. 638, 122 Pac. 324; State v. Pacific American Fisheries (1913), 73 Wash. 37, 131 Pac. 452.

[6] Educational Status of Nursing, Bulletin, 1912, No. 7.

[7] Stettler v. O'Hara (Ore. 1914), 139 Pac. 743, now on appeal before the Supreme Court of the United States. See note 51 L. R. A. (N. S.) 686; Simpson v. O'Hara (Ore. 1914), 141 Pac. 158. Freund suggests the commission plan as the most feasible (Mar., 1914), 4 Am. Lab. Leg. Rev. 130.

[8] Ex parte Kuback (1890), 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226.

[9] Worthington v. Breed (1904), 142 Cal. 102, 75 Pac. 675.

[10] Holden v. Hardy (1898), 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383; Matter of Martin (1909), 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.), 242. But see Lochner v. New York (1905), 198 U. S. 45, 49 L. Ed. 93, 25 Sup. Ct. Rep. 539, contra.

[11] People v. Erie Ry. Co. (1910), 198 N. Y. 369, 91 N. E. 849.

[12] State v. Newman Lumber Co. (1913), 103 Miss. 263, 60 So. 215, 45 L. R. A. (N. S.) 858; State v. Bunting (Ore., 1914), 139 Pac. 731.

Digitized by Google

exercising legislative functions in such a form as to be conclusive on their face, without allowing resort to the courts on the question of whether or not the rates or regulations are reasonable.[1] Ex parte Young[2] and the cases following it have declared that the imposition of extremely severe, cumulative penalties amounts to a denial of the right of appeal, since no corporation could take the chance of incurring the enormous penalties which would accrue, pending decision by the courts, if the rates were sustained and would therefore be forced to submit to possibly unlawful regulations in the first place. The rule was followed in *Wadley Southern Railway Company v. State of Georgia*[3] but qualified to the extent that the utility must follow the course of appeal provided in the state courts, and if it fails to do so it is liable to the penalties incurred, since advantage was not taken of the opportunity given to test the reasonableness of the rates without incurring liability. It is admitted that a state may impose penalties as heavy as necessary to enforce its laws if they are valid. Similarly in *Kern Trading and Oil Company v. Associated Pipe Line Company*[4] the pipe line company was obliged to resort to the state courts, but the collection of any fees or penalties was enjoined until the reasonableness of the pipe line acts and orders of the railroad commission thereunder was determined. In *Van Dyke v. Geary*[5] the collection of penalties for violation of the orders of the Arizona Corporation Commission was enjoined, and, as no case had been commenced in the state courts, the federal court proceeded to determine the reasonableness of the regulations in question.

The courts have universally followed the doctrine of the Young case[6] and it seems fair enough to all parties as a practical matter, but it is difficult to see by what legal principles it is to be justified. No right to bring a test case free from liability to the penalty pro-

---

[1] Chicago, etc. Ry. Co. v. Minnesota (1890), 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. Rep. 462, 702.

[2] (1908), 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

[3] (Jan. 11, 1915), 235 U. S. 651, 35 Sup. Ct. Rep. 214. See also Prentis v. Atlantic Coast Line Co. (1908), 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. Rep. 67.

[4] (Sept. 14, 1914), 217 Fed. 273.

[5] (Aug. 12, 1914), 218 Fed. 111.

[6] Most of the cases on this point are referred to in the principal case. The doctrine first came clearly before the courts in a dictum of Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Co. (1901), 183 U. S. 79, at p. 100, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30. Since it was definitely announced in the Young case it has been invoked with increasing frequency in connection with most cases involving rate regulations, either directly by the legislature or by a commission exercising legislative functions. In a few cases, the doctrine of the Young case was recognized as binding but the penalties in question were held not to be excessive. But see criticism of the doctrine by Henry H. Furth in 77 Cent. Law Jour. 308.

Digitized by Google

vided in a criminal statute or police regulation is recognized as a matter of law, and a man resists such a statute at his peril. Why then should the rule be different in statutes regulating public utilities? The attempted distinction on the ground that such statutes are valid only if the rates are reasonable, while in the former class of laws the jurisdiction of the legislature is unrestricted, hardly appears sound. All laws are subject to certain constitutional limitations on legislative action. It is a judicial question whether a law is ex post facto or a deprivation of due process upon which every person concerned is entitled to a hearing, yet no court will enjoin the collection of the penalties imposed for violation of such statutes, no matter how severe they may be, to allow the decision of a test case. Most police regulations depend largely on the question of reasonableness and necessity yet it is hardly pretended that the doctrine of the Young case applies to them. Declaring these rate laws unconstitutional because the penalties deter resort to the courts is virtually an assertion by the courts of an ultimate veto power over such regulations, a claim that the law is not wholly effective until they have had an opportunity to pass upon it at least once. This appears contrary to the whole doctrine of the relation of the judiciary to the legislature. It is recognized that there is no right to appeal to the courts before the law becomes effective, unless given by the act itself, and that the reasonableness of the rates may be questioned in a suit to enjoin their enforcement or to collect the penalties.[7] In such cases the decision of the court adds nothing to the validity of the law, any more than in any other class of legislation. If unreasonable the law was so from the moment of passage and no liability is incurred for violation, while if reasonable there has been a violation of a valid act, and yet the person breaking the law is excused from liability. The possibility of invalidity is no greater with these laws than with many others where the imposition of such penalties as possibly to prevent an attack on their validity is not considered a ground for setting aside the law, in whole or in part.[8] Since the constitutionality of a law is only determined in reference to the rights of an individual, and, as pointed out in the principal case, the same law may be invalid as to one person while valid as to another, must

---

[7] Louisville, etc. R. R. v. Garrett (1913), 231 U. S. 298, at p. 313, 34 Sup. Ct. Rep. 48.

[8] In Coal & Coke Ry. Co. v. Conley (1910), 67 W. Va. 129, 67 S. E. 613, the court avoided having to declare any part of the law invalid by interpreting the act as evidencing an intention on the part of the legislature to suspend the penalty clause as to any person making a bona fide appeal to the courts on the question of reasonableness. While it is hard to see the evidence of such intention in the law in question it would seem to be better policy for the courts to refrain from any interference unless the act did contain an exemption pending appeal, directly or by implication.

Digitized by Google

every person affected by a rate law be given an opportunity to have his rights determined by the court before he incurs any liability to the penalties provided in the law? This is practically announcing the doctrine that a man has a right to break a law at least once to determine whether it is valid, or that the approval of the courts is an essential element in this class of laws.

J. S. M., Jr.

CONVERSION: EVIDENCE OF OWNERSHIP: PRIMA FACIE CASE.—In the case of *Cooper v. The Spring Valley Water Company*[1] plaintiff appealed from a judgment for the defendant entered upon a directed verdict. Plaintiff, as executor of one Dr. Lochhead, sued defendant for the conversion of certain shares of stock alleged to be the property of his testator. The alleged acts of conversion consisted in an unauthorized transfer of the stock upon the books of the defendant. Upon the trial of this action plaintiff introduced evidence to the effect that Dr. Lochhead, for several years prior to his death, was the owner of the stock, which stood in his name upon the defendant's books, and upon which he had received dividends, which had been collected by his attendant physician, Dr. Terrill, under an order given by plaintiff's testator. Upon the death of Dr. Lochhead, plaintiff gave notice to defendant that the indorsed certificate of stock was believed to be in the possession of Dr. Terrill, and forbade defendant to transfer the stock upon its books. After the receipt of this notice, Dr. Terrill presented this certificate to defendant for transfer to himself, which was refused. Subsequently the same certificate was presented by Dr. Terrill's pledgee, and a transfer was made to it.

On this appeal the judgment for defendant was affirmed, the court holding that the facts above set out do not constitute a prima facie case, upon the theory that Dr. Lochhead was the owner of the stock at the time of his death, and that it had been subsequently stolen by Dr. Terrill. In reaching this conclusion it seems that the court has placed undue emphasis upon an opening statement made by plaintiff's counsel, that plaintiff expected to prove by circumstantial evidence that Dr. Terrill had stolen the stock, and has treated this alleged theft as one of the principal issues of the case. If this had been a criminal proceeding against Dr. Terrill, then it would have been incumbent upon the prosecution to establish the theft, but for the purposes of this case, it seems that it was immaterial how Dr. Terrill got the stock, if he was not entitled to it.[2]

The court argues that possession of personal property is prima facie evidence of its ownership, and that when plaintiff alleged

---

[1] (Dec. 22, 1914), 19 Cal. App. Dec. 855. Rehearing granted Feb. 18, 1915.

[2] See Cooper v. Spring Valley Water Co. (1911), 16 Cal. App. 17, 22, 116 Pac. 298.

Digitized by Google

that the property was in the possession of Dr. Terrill, he thereby stated himself out of court. But the possession of Dr. Terrill was alleged to be wrongful, and if a like presumption were indulged in in every case where a plaintiff out of possession seeks to recover the value of his property, it would be very difficult for him to state a cause of action in trover.[3]

It is stated by the court that the fact that the stock stood in the name of Dr. Lochhead at the time of his death is no evidence, presumptive or otherwise, that Dr. Lochhead was the owner of the stock at that time. Undoubtedly as between the parties to a sale of stock, title may pass without a transfer upon the books of the company, but the fact that the stock stood in Dr. Lochhead's name and that he had received dividends upon it until the time of his death would show that he had been the owner, and it seems that plaintiff should have been entitled to the presumption that, until an assignment was shown, title continued in his testator, and that defendant should have been compelled to go into the evidence upon the issue of ownership.[4]

J. D. R.

CRIMINAL LAW: PUBLIC TRIAL: RIGHT OF COURT TO EXCLUDE PUBLIC FROM COURTROOM.—The question of what constitutes a public trial is one which has long vexed our courts. The Supreme Court of Idaho was recently confronted with the problem in the case of *State v. Johnson*.[1] In that case the defendant was convicted of the crime of assault with the intent to commit rape. The trial court excluded all spectators from the courtroom during the progress of the trial, and the defendant contended that he was thereby deprived of his constitutional right to a public trial. On appeal it was held that in a case of this kind where the evidence was likely to be of an immoral and disgusting nature, the court had not erred in excluding the public, but that friends of the defendant who desired to be present, or officers of the court and members of the bar ought not to be excluded. The case apparently rests upon the ground that there is no presumption of injury and that the defendant should have made it clear that authorized persons were excluded, and perhaps have requested their presence.

---

[3] See Weston v. Higgins (1855), 40 Me. 102; Chambless v. Livingston (1905), 123 Ga. 257, 51 S. E. 314. The action in the nature of trover for the conversion of shares of stock differs from the common law action of trover only in the character of property involved, Payne v. Elliot (1880), 54 Cal. 339, 35 Am. Rep. 80.

[4] Pollock and Pollock v. The National Bank (1852), 7 N. Y. 274; Magee v. Scott (1851), 9 Cush. (Mass.) 148, 55 Am. Dec. 49; Hanson v. Spring Valley Water Co. (1911), 16 Cal. App. 17, at p. 25, 116 Pac. 298.

[1] (Dec. 22, 1914), 144 Pac. 784.

Digitized by Google

The question of how far the trial court may go in excluding the public from the courtroom, is by no means a settled one. In civil actions there is a surprising lack of authority upon this point. In England the court will order a private hearing of a case if the parties request it, but aside from cases in which the whole object would be defeated by a public trial, such as cases relating to lunatics or wards of the court, and in cases where the practice of the ecclesiastical courts is preserved, the court has no power to order a trial in private.[2] In the absence of statute this common law rule would doubtless prevail in our courts, but there is no constitutional provision prohibiting legislation on this subject in connection with civil actions. In California, trials must be public, except in the case of certain enumerated exceptions,[3] which have been construed as applying to civil actions, but not to criminal.[4]

In criminal trials the question can not be so easily disposed of. The constitution of the nation, and those of the states generally, guarantee a public trial in criminal cases.[5] The authorities agree, however, that the court may exclude the public, in whole or in part from the courtroom, where such action is necessary for the proper administration of justice. Thus it was held not to be error to exclude spectators temporarily in order to suppress a commotion in the courtroom,[6] or where the crowd excited the defendant who was testifying.[7] Nor is it error to limit the crowd to the seating capacity of the courtroom,[8] and when the evidence is of an indecent nature it is agreed that persons of tender years may be excluded.[9] Beyond this, on authority and principle there is no right of exclusion, except, possibly, in the interest of public morality, where the testimony is indecent in its nature, but as to the existence and the extent of this exception there is a sharp conflict. Some of the courts hold that all of the public may be excluded from the courtroom in such cases.[10] Other and equally respectable authorities have ruled that because of prejudice, or possible prejudice, to the defendant, the public may not be excluded.[11] The Michigan

---

[2] Daubney v. Cooper (1829), 10 B. & C. 237, 192 Eng. Repr. 438, 38 Cyc. 1298, note 6.

[3] Cal. Code Civ. Proc., § 125.

[4] People v. Hartman (1894), 103 Cal. 242, 37 Pac. 153.

[5] U. S. Const., 6th amendment; Cal. Const. art. i, § 13.

[6] Stone v. People (1840), 3 Ill. 326; Lide v. State (1902), 133 Ala. 43, 31 So. 953.

[7] People v. Kerrigan (1887), 73 Cal. 222, 14 Pac. 849.

[8] Wendling v. Commonwealth (1911), 143 Ky. 587, 137 S. W. 205.

[9] Tilton v. State (1908), 5 Ga. App. 59, 62 S. E. 651; State v. Hensley (1906), 75 Oh. St. 255, 79 N. E. 462, 9 L. R. A. (N. S) 277.

[10] Benedict v. People (1896), 23 Colo. 126, 46 Pac. 637; Robertson v. State (1912), 64 Fla. 437, 60 So. 118; People v. Swafford (1884), 65 Cal. 223, 3 Pac. 809.

[11] People v. Yeager (1897), 113 Mich. 228, 71 N. W. 491; State v. Osborne (1909), 54 Ore. 289, 103 Pac. 62.

Digitized by Google

courts have laid down the extreme rule in this respect.[12] The court in the principal case has adopted the rule laid down by the better considered cases, which is to exclude the merely curious, but allow friends of the defendant, members of the bar and the press to be present if they so desire. If the California courts are to follow the case of People v. Hartman,[13] the trial court may not, in this state, go so far as to exclude every one except court officers, but the opinion in that case leaves us in doubt as to how far the exclusion may be extended. As a matter of practice the trial courts in this state do not order the exclusion of the general public, but confine themselves to a suggestion that the spectators leave the courtroom.[14]

A. H. C.

EVIDENCE: IMPEACHMENT BY INCONSISTENT STATEMENTS: FOUNDATION RULE:—"You have testified on direct examination that the defendant wore a grey suit. Didn't you tell Mr. X. that the defendant wore a black suit?" How often have we heard a young lawyer begin his cross examination that way, and then stand in bewildered confusion when the court sustained an objection to the question on the ground that no foundation had been laid, until the kindly judge suggested "Relate to him the time, place and persons present". It comes as a surprise to lawyers, however, to be told that the question as asked is entirely proper, and that such an objection should be overruled. Section 2052 of the Code of Civil Procedure provides: "A witness may also be impeached by evidence that he had made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them". There is no doubt that such a question as the one above is intended to impeach and taking the code section literally a foundation should be laid, but practical experience in trials warrants the interpretation which the court gives to the section in *People v. Webber*[1], following Mr. Justice Henshaw's authoritative exposition of the rule in People v. Jones[2]. To the above impeaching question the witness may reply "Yes"; in which case the answer shows that no foundation was necessary as the

---

[12] People v. Murray (1891), 89 Mich. 276, 50 N. W. 995.

[13] (1894), 103 Cal. 242, 37 Pac. 153. For collection of authorities see monographic notes to State v. Hensley (Ohio, 1906), 9 L. R. A. (N. S.) 277, and State v. Nyhus (N. D, 1909), 27 L. R. A. (N. S.) 487.

[14] People v. Gregory (1908), 8 Cal. App. 738, 97 Pac. 912.

[1] (Jan. 26, 1915), 20 Cal. App. Dec. 155.

[2] (1911), 160 Cal. 358, 117 Pac. 176.

Digitized by Google

witness remembered the conversation. On the other hand the witness may answer "No", and the cross-examiner may not pursue the matter further, in which case no harm has been done. It is only when the cross-examiner desires to prove the impeaching statement by other witnesses that fairness requires the witness should be informed of the time, place and persons present when the alleged statement was made. In the principal case the rule was applied to expressions of hostility. These can hardly be said to be inconsistent statements but the same consideration of fairness to the witness requires that the circumstances should be related to him before the other witnesses are called in contradiction.

When the impeaching statement is in writing, however, the writing must be first shown to the witness. This rule simply ruins effective cross-examination and is based upon an erroneous decision of an English judge, later corrected by act of Parliament.[3] The code, however, incorporates the erroneous rule and puts the matter beyond the possibility of change by judicial decision.

A. M. K.

EXECUTORS AND ADMINISTRATORS: EFFECT OF JUDGMENT ESTABLISHING A REJECTED CLAIM.—The case of the *Estate of Hellier*[1] calls to notice an interesting anomaly in the California law governing the administration of the estates of decedents. It is well established both by legislative enactment and judicial decision that a judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate merely establishes the claim in the same manner as if it had been allowed by the executor or administrator and the court,[2] and that such judgment may be afterwards contested by any person interested in the estate in the same manner and to the same extent as any other allowed claim.[3] Section 1504 of the Code of Civil Procedure is construed to limit the general provisions of section 1582, which enact that actions for the recovery of real or personal property or to quiet title or to determine adverse claims thereto, and *all actions founded upon contracts,* may be maintained by and against executors or administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.[4] In other words, in all actions enumer-

---

[3] Wigmore on Evidence, §§ 1259-1263.

[1] (Dec. 29, 1914), 49 Cal. Dec. 5, 145 Pac. 1008.

[2] Cal. Code Civ. Proc., § 1504; Beckett v. Selover (1857), 7 Cal. 215, 68 Am. Dec. 237; Hall v. Cayot (1903), 141 Cal. 13, 74 Pac. 299; Nathan v. Dierssen (1913), 164 Cal. 607, 612, 130 Pac. 12.

[3] Estate of More (1898), 121 Cal. 635, 54 Pac. 148.

[4] Estate of Hellier (Dec. 29, 1914), 49 Cal. Dec. 5, 145 Pac. 1008.

Digitized by Google

ated in section 1582, except upon money claims, a judgment against an executor or administrator concludes the heirs, legatees and devisees, but in the case of money claims, such a judgment does not attain the dignity and force of an absolute judgment until it has been adjudicated on the settlement of an account, or on the rendition of an exhibit, or in making a decree of sale.[5] It is only after the settlement of the account that an executor or administrator can safely discharge such a judgment,[6] and even then he is subject to the right of persons laboring under legal disability to re-open and examine the account.[7]

Although this is a reasonable literal interpretation of the law as it stands on the books,[8] the provision, as construed, seems inconsistent with the general theory of the law of administration. At the common law the executor or administrator represented the person of his testator or intestate,[9] and took all of his personal property.[10] This was the primary fund out of which the debts of the deceased were to be paid, and a judgment against the executor or administrator was binding upon all persons interested in the personalty.[11] In the case of realty, which descended directly to the heir,[12] a judgment against the executor or administrator was not necessarily binding upon the heir to the extent of subjecting the real estate, which had descended to him, to the satisfaction of the judgment.[13]

But in California both the real and personal estate of the ancestor vest in heir, legatee or devisee, subject to the lien of the executor or administrator for the payment of debts,[14] and realty and personalty are equally subject to the burden of the debts of the estate and the expenses of administration.[15] So, while the California law has abrogated the common law distinction between real and personal property in this respect, and has recognized the right of the executor or administrator in the real estate to the full logical extent,[16] allowing a judgment against them to bind the realty as well as personalty, it has made a peculiar exception in the case of money claims.

---

[5] Cal. Code Civ. Proc., § 1636; Haub v. Leggett (1911), 160 Cal. 491, 117 Pac. 556.

[6] Cal. Code Civ. Proc., § 1647.

[7] Cal. Code Civ. Proc., § 1637.

[8] Hall v. Cayot (1903), 141 Cal. 13, 74 Pac. 299.

[9] Comyns' Dig., vol. 1, p. 259.

[10] Williams on Executors, 9th ed., vol. 1, p. 775.

[11] Woerner, American Law of Administration, 2nd ed., § 466.

[12] Williams on Real Property, 21st ed., p. 19.

[13] Woerner, American Law of Administration, 2nd ed., §§ 337, 446.

[14] Cal. Code Civ. Proc., § 1581.

[15] Cal. Code Civ. Proc., § 1516.

[16] Woerner, American Law of Administration, 2nd ed., § 337; Moody v. Peyton (1896), 135 Mo. 482, 36 S. W. 621; Proctor v. Proctor (1890), 105 N. C. 222, 10 S. E. 1036.

Digitized by Google

This rule may, in some instances, work great hardship upon the claimant. In the first place, if he loses his first suit, he is barred from further remedy, if he wins, he gets a judgment which is merely prima facie evidence of the validity of his claim.[17] Furthermore, it is a notorious fact that the administration of many estates is prolonged for a long period of years, so that the claimant's witnesses may die or disappear in the meantime. The inequality in the position of the claimant and of the heirs, legatees and devisees, whereby those interested in the estate have at least two chances to win as against the claimant's one, suggests that section 1636 of the Code of Civil Procedure, as interpreted in the principal case, may be obnoxious to the equal protection clause in the state and federal constitutions. That inequality is at least as great as that existing between the mechanics' lien claimant and the owner in respect to the allowance of attorneys' fees, which induced the Supreme Court to declare a statutory provision, for such allowances to the lien claimant, unconstitutional.[18]

Although the point has never been directly raised, it is doubtful whether the heirs or other persons interested would be proper parties defendant in the suit by the claimant. By our system of administration the heirs are only brought into the proceeding at a certain stage upon petition and notice, and previous acts of the executor or administrator and the judge must occur before they can contest.[19] It is clear that they are not necessary parties,[20] and it is questionable whether the courts would allow the regular order of administration to be disturbed in such a case. It would certainly be impracticable to join the creditors in such a suit.

A. A.

MINING LAW: EMINENT DOMAIN: PUBLIC USE.—Few questions have been submitted to the courts upon which there have been a greater variety and conflict of reasoning and results than those presented as to the meaning of the words "public use", as found in the different state constitutions regulating the right of eminent domain.[1] The case of *Inspiration Consolidated Copper Company v. New Keystone Copper Company*,[2] follows the narrower interpretation and holds that, in order to constitute a

---

[17] Shiels v. Nathan (1910), 12 Cal. App. 604, 108 Pac. 34; Estate of More (1898), 121 Cal. 635, 638, 54 Pac. 148.

[18] Builders' Supply Depot v. O'Connor (1907), 150 Cal. 265, 88 Pac. 982.

[19] Beckett v. Selover (1857), 7 Cal. 215, 241, 68 Am. Dec. 237. See Miller and Lux v. Katz (1909), 10 Cal. App. 576, at p. 579, 102 Pac. 946.

[20] Robertson v. Burrell (1895), 110 Cal. 568, at p. 575, 42 Pac. 1086.

[1] For a discussion of "public use" see comment on State ex rel. Mountain Timber Co. v. Superior Court (1914), 77 Wash. 585, 137 Pac. 994, in 2 Cal Law Rev. 318. Also see comment on Anderson v. Smith-Powers Logging Co. (Ore., 1914), 139 Pac. 736, in 2 Cal. Law Rev. 407.

[2] (Ariz., Nov. 25, 1914), 144 Pac. 277.

Digitized by Google

"public use", the use must be one in which the public itself participates. The condemnation of a right of way for a tunnel through the defendant's intervening mining property so as to connect plaintiff's non-contiguous groups of mining properties and facilitate the transportation of plaintiff's ore was denied on the ground that it was purely a "private use"; "as the tunnel could not be used by others only with the plaintiff's consent".

The court held that article two, section seventeen of the Constitution of Arizona which provides: "Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic or sanitary purposes, etc.", did not relate to "public uses" but only to the taking of property for a private use. And since the legislature had not defined "private ways of necessity" the court would not, in the absence of specific legislative definition, hold this tunnel to be a private way of necessity. It would seem, however, that this clause of the constitution was self executing and that it was consequently within the province of the court to interpret the meaning of this phrase and not to await further action of the legislature. It is admitted that the authorities are in conflict on this point. The courts of Washington have held[3] that a constitutional provision designed to protect the public against the taking of private property by the right of eminent domain, without just compensation, was not self executing and property could not be taken without statutory authority. On the other hand, the courts of Alabama[4] and Missouri[5] have held that such provisions enacted in the constitution are self executing and are to be enforced without supplemental legislation. The latter view seems to be the better and represents the modern tendency in the field of constitutional interpretation.[6] As was said by Mr. Justice Temple in the case of Winchester v. Howard,[7] which has been cited with approval:[8] "Under former constitutions it was natural that the court should presume that a constitutional provision was addressed to some officer or department of the government, or that it limited the power of the legislature, or empowered and perhaps directed certain legislation to carry into effect a constitutional policy. Now, the presumption is the reverse. Recently adopted state constitutions contain extensive codes of law, intended to operate directly upon the people as

---

[3] Long v. Billings (1893), 7 Wash. 267, 34 Pac. 936; City of Tacoma v. State (1892), 4 Wash. 64, 29 Pac. 847.

[4] Woodward Iron Co. v. Cabaniss (1889), 87 Ala. 328, 6 So. 300.

[5] Hickman v. Kansas City (1894), 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684.

[6] See Prof. O. K. McMurray's article "Tendencies in Constitution Making", 2 Cal. Law Rev. 203.

[7] (1902), 136 Cal. 438, 439, 69 Pac. 77.

[8] Denninger v. Recorder's Court (1904), 145 Cal. 629, 635, 79 Pac. 360.

Digitized by Google

statutes do. To say that these are not self executing may be to refuse to execute the sovereign will of the people . . . . I should say the rule now is that such constitutional provisions must be held to be self executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not intended."

Furthermore, it would seem that it is made a judicial question by the last sentence of the section in point (article two, section seventeen), which provides: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

W. J. A.

MINING LAW: EXTRALATERAL RIGHT: APEX.—The United States Circuit Court of Appeals recently confirmed the decisions of the Idaho Supreme Court and the federal District Court, in the cases of *Stewart Mining Company v. Bourne* and *Stewart Mining Company v. Sierra Nevada Mining Company*,[1] previously noted in this Review.[2] The apex of the vein in question crossed the south side line of the Senator Stewart Fraction claim practically at right angles, and continued across this claim to within a short distance of the north side line where the vein was cut off abruptly by a fault. This fault so undercut the vein that if the country rock to the north of the fault were eroded away, it would have left the end edge of the vein, where it intersected the fault, standing out like an overhanging cliff. This end edge of the vein abutting against the fault and which on its dip crossed an end line of the claim, was claimed by the owner of the Senator Stewart Fraction to be part of the apex. The court, however, held that this end edge of the vein along the fault was not an apex in the true sense of the word and gave rise to no extralateral rights.

In the course of its opinion the court said: "Nothing to the contrary appearing, the conclusive presumption is that the Senator Stewart Fraction claim was located not exceeding 1,500 feet along the course or strike of the discovery vein and not exceeding 600 feet in width." This statement is somewhat misleading, for a presumption which may be rebutted can hardly be properly called conclusive. The conclusive presumption is that there was a discovery vein in the claim,[3] that the land was properly located,

---

[1] (Nov. 2, 1914), 218 Fed. 327.

[2] Stewart Mining Co. v. Bourne (1914), commented on in 2 Calif. Law Review, pp. 247-48, not officially reported. Also see: Stewart Mining Co. v. Ontario Mining Co. (1913), 23 Idaho 280, 132 Pac. 787, commented on in 1 Calif. Law Review, pp. 546-48, and illustrated by a diagram for a case with identical facts.

[3] Iron Silver Mining Co. v. Campbell (1892), 17 Colo. 267, 29 Pac. 513.

Digitized by Google

and that all preliminary and precedent acts necessary to authorize and justify the issuance of the patent had been performed as the law required.[4] But the patent is certainly not conclusive evidence of the physical existence of a lode to any continuous extent. Mr. Lindley in his work on Mines says that the issuance of a lode patent conclusively presumes the existence within its boundaries of an apex, but that it will not be presumed that this apex takes any particular direction or extends for any definite length.[5]

In another portion of its opinion the court makes a statement to the effect that the owner of the Senator Stewart Fraction claim is afforded no basis for the assertion of any extralateral right because the vein entered the claim through one of its side-lines and in its course or strike did not pass out of the claim at all. Though not essential to its decision this statement would seem to be too broad, as the best considered opinion does not support the idea that in order to exercise an extralateral right, the vein must pass through both side-lines.[6] In the case of end lines the courts have held that a limit is placed by the law on the length of the vein, beyond which the locator may not go, but the law does not say that he shall not go outside the vertical side-lines unless the vein in its course reaches the end-lines. In other words, the locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side-lines, but may not in such pursuit go beyond the vertical end-lines.[7] The same rule should apply where the vein enters a side-line, for in reality this side-line becomes, in contemplation of the law, an end-line. For where it is developed that the location has in fact not been placed along, but across the course of the vein, the courts have held that those which the locator called his side-lines are his end-lines, and those which he called his end-lines are in fact side-lines.

W. J. A.

MORTGAGES: EXTINGUISHMENT BY TENDER.—In the case of *Cassinella v. Allen*,[1] the California Supreme Court held that where a mortgage provided for payment of attorneys' fees in the event of legal proceedings, a tender, after suit to foreclose was begun,

---

[4] Davis v. Weibbold (1891), 139 U. S. 507 at p. 529, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628; U. S. v. Iron Silver Mining Co. (1888), 128 U. S. 673 at p. 685, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195; Los Angeles F. & M. Co. v. Thompson (1897), 117 Cal. 594, 49 Pac. 714.

[5] 3rd ed. § 780, p. 1899.

[6] See figure 23, p. 427, of Costigan on Mining Law.

[7] Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (1898), 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 Morr. Min. Rep. 370; Work Mining & Milling Co. v. Doctor Jack Pot Mining Co. (1912), 194 Fed. 620.

[1] (Nov. 24, 1914), 48 Cal. Dec. 465, 144 Pac. 746.

Digitized by Google

of the full amount of the principal, interest and costs was insufficient to extinguish the lien of the mortgage, because the tender did not include everything due to the mortgagee. The court took great pains to find that attorneys' fees were due under the pleadings, but it is very doubtful if the tender would have extinguished the mortgage even though no attorneys' fees were due.

At common law a tender will not extinguish a mortgage if made after the law day, i. e., the day upon which the obligation becomes due.[2] The reason for this rule is that upon failure to pay at the specified day, according to the condition of the mortgage, the mortgagee's title becomes absolute, and he cannot be required to accept the tender and restore the property. In those states where a mortgage amounts only to a lien upon the property, the reason for the rule fails, and as a consequence it is held generally that a tender after the law day will extinguish the lien of the mortgage.[3]

In the case of Perre v. Castro[4] in 1860 the precise question seems to have been raised in California for the first time. The court in that case, without noticing the fact that the lien theory of mortgage had been substituted for the common law theory, adopted the common law view, holding that a tender after the law day would not extinguish the mortgage. Chief Justice Sawyer by way of dictum in the case of Ketchum v. Crippen,[5] criticized the earlier decision, but it was reaffirmed in 1875 in the case of Himmelmann v. Fitzpatrick[6]—a case decided after the adoption of the code, though the facts arose before that time. It was intimated in that case that under the provisions of the code a tender made after the obligation became due would at least affect the running of interest.

Section 1504 of the Civil Code of California provides: "*Effect of offer on accessories of obligation.*[7] An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."

---

[2] Maynard v. Hunt (1827), 5 Pick. (Mass.) 240; Rowell v. Mitchell (1876), 68 Me. 21; Shields v. Lozear (1869), 34 N. J. L. 496, 3 Am. Rep. 256.

[3] Kortright v. Cady (1860), 21 N. Y. 343, 78 Am. Dec. 145; Caruthers v. Humphrey (1864), 12 Mich. 270.

[4] 14 Cal. 519, 76 Am. Dec. 444.

[5] (1869), 37 Cal. 223.

[6] 50 Cal. 650.

[7] The title to this section shows its relation to the section next quoted. Titles to code sections are to be construed with the sections themselves in interpreting the intention of the legislature. The San Joaquin & Kings River Canal and Irr. Co. v. Stevinson (Jan. 9, 1915), 20 Cal. App. Dec. 61.

Digitized by Google

Section 2909 provides: "*Lien deemed accessory to the act whose performance it secures.* A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation."

It would seem that under a strict interpretation of these sections, a mortgage would be extinguished by a tender though made after the day upon which the obligation becomes due. The courts, however, have interpreted the sections more leniently. It has been held that a tender, unless kept good by depositing the money in a bank as provided in section 1500 of the Civil Code, will only stop the running of interest and will not extinguish the lien of the mortgage.[8] In the case of Chielovich v. Krauss[9] in 1886 the code provisions were entirely overlooked. The court there stated in a summary manner that the rule in California to the effect that a tender could not be made after the law day, was settled by the case of Himmelman v. Fitzpatrick.[10]

Assuming that a mere tender will extinguish the lien of the mortgage, would the mortgage in the principal case have been extinguished by a tender which included a reasonable amount as attorneys' fees? It would seem not, for the code does not appear to have changed the common law rule that a tender cannot be pleaded where the amount due at the time the tender was made is unliquidated.[11] In Michigan, where there is a strict statute to the effect that a tender will extinguish a mortgage, it has been held that where a mortgagee might in good faith be mistaken as to what he has a right to exact, a refusal to accept a tender which the court later finds to have been sufficient, will not discharge the mortgage.[12]

If the views herein set forth are correct, the court could have held that the tender was insufficient to discharge the lien either because it was made after the day upon which the obligation became due, or because the amount owing at the time of the tender was unliquidated. The court chose to rest its decision upon the narrower ground that the tender was insufficient because

---

[8] Chapman v. Benedict (1906), 3 Cal. App. 399, 86 Pac. 736; Wadleigh v. Phelps (1906), 149 Cal. 627, 87 Pac. 93. In the case of Leet v. Armbruster (1904), 143 Cal. 663, 77 Pac. 653, there is a strong dictum by Mr. Justice Henshaw to the effect that a tender will extinguish a lien. The case itself, however, concerned a tender by a redemptioner, which situation is definitely provided for by § 704 Cal. Code Civ. Proc.

[9] 2 Cal. Unrep. Cas. 643, 9 Pac. 945.

[10] (1875), 50 Cal. 650.

[11] Lawrence v. Gifford (1835), 17 Pick. (Mass.) 366; Dearle v. Barrett (1834), 2 A. & E. 82, 3 Dowl. P. C. 13, 4 N. & M. 200, 29 Eng. Com. Law Rep. 58, 111 Eng. Repr. 32; Davys v. Richardson (1888), 21 Q. B. Div. 202, 57 L. J. Q. B. 409, 59 L. T. Rep. (N. S.) 765, 36 Wkly. Rep. 728.

[12] Canfield v. Conkling (1879), 41 Mich. 371, 2 N. W. 191.

Digitized by Google

attorneys' fees were not included. It may be questioned whether the court might not have placed its decision upon the still narrower ground that the tender was ineffective,[18] having been made after the commencement of the suit.

E. J. S.

OMISSION IN PLEADING: DEFECT CURED BY THE ADMISSION OF EVIDENCE.—*Slaughter v. Goldberg, Bowen & Co.*[1] was an action for the death of plaintiff's son, alleged to have been caused by the negligence of defendants. The complaint contained no allegation whatever of the existence of heirs; but after the overruling of a general demurrer, plaintiff testified without objection to the fact that the decedent was her son, and to other facts showing that she was damaged by his death. The omitted allegation has been held to be essential to the statement of a cause of action of this character;[2] and after judgment for the plaintiff, the defendant on appeal urged that the defect was not cured by the admission of the evidence in question. However, technical objections like this seem to be going out of fashion, for, relying on that oft slighted section 475 of the Code of Civil Procedure, the court disposed of the contention by asking the question: "How can it be said that the defendant has sustained substantial injury and that a different result would have been probable if such error . . . . or defect . . . . had not occurred?"

The decision in this case indicates a new and more liberal attitude towards the consideration, on appeal, of defects in pleading. The previous decisions had allowed the appellant to prevail upon showing any substantial defect in his opponent's pleading, whatever the condition of the evidence,[3] unless the defect had been cured by the fact that the appellant's own pleading supplied the omitted allegation.[4] Under these decisions, had the principal case been appealed upon the judgment roll alone, a reversal might have resulted.[5] And if a general demurrer had been sustained, and the

---

[18] At common law a tender cannot be made after suit is begun. Levan v. Sternfeld (1892), 55 N. J. L. 41, 25 Atl. 854; Murray v. Windley (1847), 29 N. C. (7 Ired. Law) 201, 47 Am. Dec. 324. This rule has not been changed by the code unless such a tender can be considered as a "due offer" or "duly made" under § 1500 or § 1504 Cal. Civ. Code. § 997 Cal. Code Civ. Proc. provides only for a written offer of compromise after suit.

[1] (Jan. 14, 1914), 20 Cal. App. Dec. 89, rehearing denied by the Supreme Court March 15, 1915.

[2] Webster v. Norwegian Mining Co. (1902), 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Jones v. Leonardt (1909), 10 Cal. App. 284, 101 Pac. 811.

[3] Richards v. Travelers' Ins. Co. (1889), 80 Cal. 505, 22 Pac. 939; Ruiz v. Santa Barbara Gas Co. (1912), 164 Cal. 188, 128 Pac. 330. See also comment 3 Cal. Law Rev. 163.

[4] Abner Doble Co. v. Keystone etc. Mining Co. (1904), 145 Cal. 490, 78 Pac. 1050.

[5] Buckman v. Hatch (1903), 139 Cal. 53, 55, 72 Pac. 445; Richards v. Travelers' Ins. Co. supra, note 3.

Digitized by Google

plaintiff had declined to amend, a judgment entered upon the sustaining of the demurrer would doubtless have been affirmed.[6] However, in the present case, the appellate court had before it the evidence given at the trial, from which it appeared that the error in overruling the demurrer had not worked any prejudice.

That the court was correct in its decision, and that it did not err in citing the newly amended section four and one half of article six of the California Constitution[7] in support of its conclusion, is apparent. In a recent decision[8] the Supreme Court has held that this section applies not only to cases appealed after its passage but also to pending appeals, and it has also denied a rehearing in the principal case.[9]

G. H. G.

PARENT AND CHILD: SUPPORT OF CHILD: LIABILITY OF FATHER.—In the case of *Rogers v. Rogers*[1] the husband abandoned his wife and four small children under the age of nine years on April 18, 1908. On May 17, 1912, the wife secured a divorce with alimony. Later she began suit for the cost of maintenance of the children during the time from abandonment until the date of the divorce decree. The principal defence was that the divorce had been granted to the wife with the custody of the children, and that the decree said nothing concerning the support of the children during the period before the divorce. The court sustained the wife's right to recover for support of the children from the date of the husband's abandonment to the date of the divorce, saying, "During the time referred to the father was not released from the duty of caring for his children, nor precluded from having a voice in determining what expenses should be incurred. The wife had not voluntarily assumed the sole responsibility for their support. That was forced upon her by his misconduct.

The liability of parents to support their children rests upon an entirely different foundation from that upon which the law bases the duty of the husband to care for his wife. The obligation is at once moral and legal, and does not depend upon the marriage, but upon the fact of parentage.[2] Hence, the dissolution of the marriage does not dissolve the obligation to support; and it is not the policy of the law to deprive children of their rights on account

---

[6] Brown v. Orr (1865), 29 Cal. 120; Burke v. Maguire (1908), 154 Cal. 456, 98 Pac. 21.

[7] Senate Const. Amend. 12, Amendments and Proposed Statutes, Nov., 1914, p. 3.

[8] Vallejo & Northern R. R. Co. v. Reed Orchard Co. et als. (March 5, 1915), 49 Cal. Dec. 340.

[9] (March 15, 1915).

[1] (Kans., Oct. 10, 1914), 143 Pac. 410.

[2] State v. Seghers (1909), 124 La. 115, 49 So. 998; Rounds Bros. v. McDaniel (1909), 133 Ky. 669, 118 S. W. 956.

Digitized by Google

of dissensions of their parents.[3] Some courts hold that the duty is the joint obligation of both husband and wife,[4] but the prevailing view at common law is, that it is the primary duty of the father to support his children, if able to do so, even though they have separate property.[5] This liability continues until the child is able to care for itself or until it becomes of age, even though the custody of the child may have been awarded to the wife by a divorce decree.[6] To allow the contention that the rights of a parent and child are reciprocal, and that the father is absolved from further liability for maintenance by depriving him of the child's custody, is to put a premium upon his voluntary misconduct and to allow the father to convert such misconduct into a shield against his parental liability. "It is fundamental, equally in our law and in natural reason, that no one can cast off an obligation by refusing to keep it, or any duty by any evil doing. . . . . Parents . . . . cannot cast off the obligation [to support] by its neglect or by any other wrong. . . . . Commonly where this duty to a child exists, connected therewith is the right to its services. But a father who by ill doing forfeits his claim to its services and custody does not thereby free himself from his own duty of support."[7] The right of a wife to recover might also be based upon the ground of agency, for if she can pledge her husband's credit for reasonable expenses, such as medical attendance,[8] it seems that she could also demand reimbursement for money paid out for the children's support.

In California the subject of the support of children is covered by statute.[9] The precise point raised in the principal case apparently has never been raised in this state. Under section 197 of the Civil Code, as it read prior to the amendment of 1913, "The father of a legitimate unmarried minor child is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without

---

[3] Pretzinger v. Pretzinger (1887), 45 Oh. St. 452, 15 N. E. 471, 4 Am. St. Rep. 542; Keller v. City of St. Louis (1899), 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

[4] Johnson v. Barnes (1886), 69 Iowa 641, 29 N. W. 759.

[5] In re Putney (1908), 61 Misc. 1, 114 N. Y. Supp. 556; First Natl. Bank v. Greene (Ky., 1908), 114 S. W. 322. See notes to Porter v. Powell (Iowa, 1890), 7 L. R. A. 176; National Valley Bank v. Hancock (Va., 1902), 57 L. R. A. 728, also 29 Cyc. 1606, note 88.

[6] Spencer v. Spencer (1906), 97 Minn. 56, 105 N. W. 483, 7 Ann. Cas. 901; Evans v. Evans (1911), 125 Tenn. 112, 140 S. W. 745, 28 Ann. Cas. 294, and note.

[7] 2 Bishop on Marriage, Divorce and Separation, §§ 1223, 1224.

[8] McMillen v. Lee (1875), 78 Ill. 443; Bazeley v. Forder (1868), L. R. 3 Q. B. 559.

[9] Cal. Pen. Code, § 270. See also 2 Cal. Law Rev. 145; Cal. Civ. Code, §§ 193-230. Liability after divorce, 1 Cal. Law Rev. 286; McKay v. McKay (1899), 125 Cal 65, 57 Pac. 677; Selfridge v. Paxton (1905), 145 Cal. 713, 79 Pac. 425.

Digitized by Google

her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or refuse to take the custody, or has abandoned his family, the mother is entitled thereto." Section 196 of the same code provides, "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability." A strict construction of these sections results in the proposition that the mother alone would become liable for the childrens' support upon the husband's abandonment, even though no judicial order were made concerning their custody, for she then becomes "entitled" to their custody. It can hardly be imagined, however, that the courts would have construed these loosely drawn sections so as to permit a worthless husband to cast the burden of supporting the children upon an innocent wife. Since the absurd amendment of section 197 in 1913 providing that husband and wife are "equally entitled" to the custody, services and earnings of the children, the right of the wife to recover under the circumstances set forth in the case which is the subject of this note, is clearly taken away, for as the husband has no superior right to their custody under section 197, he has no primary duty to support his children under section 196 of the Civil Code. The amendment was doubtless drawn with the well meaning intention of benefitting the child, but its authors seem to have expended no thought whatever upon its consequences. What, for example, does the provision mean that the father and mother are "equally" entitled to the services of the child? What if each demands different and conflicting services from the child? And how can each equally be entitled to the earnings of the child? To whom is the employer of a minor to pay wages if both the father and the mother demand them? The patriarchal family theory was at least understandable; one can imagine that the matriarchal theory might be workable; but the legal notion of a family where father and mother are in all respects endowed with equal rights is unthinkable.

C. W. H.

PUBLIC SERVICE COMPANIES: DUTY OF WATER COMPANY TO EXTEND ITS MAINS INTO NEW TERRITORY IN A CITY.—The Supreme Court of California, in *Lukrawka v. Spring Valley Water Company*,[1] established a sound judicial precedent, when it compelled the defendant to extend its mains so as to serve a populous section of the Richmond district in San Francisco. The precise question involved appears to have been hitherto unadjudicated.[2]

---

[1] (Feb. 3, 1915), 49 Cal. Dec. 177, 146 Pac. 640, reversing 15 Cal. App. Dec. 793. See 1 Cal. Law Rev. 283.

[2] See Haugen v. Albina Light and Water Company (1891), 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424, where the water company was compelled to serve a house abutting on one of its mains.

Digitized by Google

The United States Supreme Court[3] cleared the way for the decision in the principal case, by holding that the amendment to the California Constitution,[4] which granted to municipalities the right to prescribe the conditions under which public service companies can operate, did not apply to vested rights. The practical bearing of this holding in the present instance is to confirm the right of the Spring Valley Water Company to lay pipes in any street of San Francisco, without further franchise from the municipality. The question before the California court, therefore resolved itself into this: Can a water company be legally compelled to extend its system into new territory in a city in which it enjoys a general franchise?

The predecessor in interest of the defendant water company was organized and chartered for the purpose of supplying the inhabitants of San Francisco with water, and by a provision in the act of incorporation[5] [later embodied in the constitution[6]] was granted the privilege of using all the streets of the municipality for laying its pipes. Arguing from these premises, the court concluded that it was a public or community service which was contemplated by the extension of the franchise; that it was solely the better to carry out this community service that an easement over all the streets of the municipality was granted; that by the acceptance of its franchise the defendant must be held to have undertaken the service of the community of San Francisco, not with any limit as to area, but in its entirety; and therefore that defendant must extend its system of mains to meet the reasonable demands of the growing community.

This duty to serve the entire community is not, however, an absolute one, obligating a water company to supply every inhabitant within the confines of a city, but merely relative, depending upon the reasonableness of the demand for service in each particular case.[7] That the service demanded involves the laying of pipes in new territory, or considerable expenditure of money, does not necessarily control. The question of reasonableness must be decided in the light of all the circumstances of the parties, including among other things, "the duties of the company, the rights of its stockholders, the supply of water which the company may control for distribution, the facilities for making extensions to a locality beyond its present point of service, the rights of existing customers,

---

[3] Russell v. Sebastian (1914), 233 U. S. 195, 34 Sup. Ct. Rep. 517, reversing In re Russell (1912), 163 Cal. 668, 126 Pac. 857. See 2 Cal. Law Rev. 417 and 1 Cal. Law Rev. 176.

[4] § 19, art. XI, as amended in 1911.

[5] Stats. Cal. 1858, p. 218.

[6] Amendment of 1885 to § 19, art. XI of the California Constitution, Stats. Cal. 1885, p. 228.

[7] Wyman, Public Service Corporations, vol. 1, § 797.

Digitized by Google

the wants and necessities of the locality demanding it, and how far the right of the community as a whole may be affected by the demanded extension."

J. C. A.

SERVICE OF SUMMONS BY PUBLICATION: SUFFICIENCY OF AFFIDAVIT.—Section 412 of the California Code of Civil Procedure requires as one of the requisites of jurisdiction to make an order for the publication of summons that it must be made upon a verified complaint on file or by an affidavit from which it appears that a cause of action exists against the defendant in respect to whom the service is to be made. The rule is often stated to the effect that the affidavit must state probative facts from which the court could ultimately conclude that a cause of action exists.[1] It is to be noted that service in this manner is in derogation of common right and the statute should be substantially complied with[2] and strictly pursued.[3] The judge, in issuing the order, acts judicially upon the evidence presented him in the form of an affidavit or verified complaint and can act upon no other evidence.[4]

In *Lima v. Lima*,[5] service was obtained by an order given on an affidavit, which stated that the plaintiff had been by his attorney informed and verily believed that he had a good cause of action "as will fully appear by my complaint now on file herein, to which reference is hereby made." The court held that the fact that the affidavit referred to the complaint did not "measure up to the requirement of the statute that it must be made to appear by the affidavit that a cause of action exists against the defendant in respect to whom service is to be made, for such reference is to an unverified complaint." The decision of the court is undoubtedly correct upon the ground that the affidavit that affiant believed he had a good cause of action was only a conclusion and was therefore insufficient.[6] If, however, the statement of the court that "ultimate facts averred in the affidavit, must equally with the complaint, clearly disclose the statement of a cause of action in favor of the plaintiff", means that the facts must be set forth by positive averment in the affidavit, the rule thus stated

---

[1] People v. Mulcahy (1910), 159 Cal. 34, 112 Pac. 853; Columbia Screw Co. v. Warner Lock Co. (1903), 138 Cal. 445, 71 Pac. 498; Ligare v. California Southern R. R. Co. (1888), 76 Cal. 610, 18 Pac. 777; County of Yolo v. Knight (1886), 70 Cal. 431, 11 Pac. 662; Forbes v. Hyde (1866), 31 Cal. 342; Braly v. Seaman (1866), 30 Cal. 610.

[2] Ricketson v. Richardson (1864), 26 Cal. 149; Columbia Screw Co. v. Warner Lock Co. (1903), 138 Cal. 445, 71 Pac. 498.

[3] McMinn v. Whelan (1865), 27 Cal. 300; Forbes v. Hyde (1866), 31 Cal. 342.

[4] Rue v. Quinn (1902), 137 Cal. 651, 66 Pac. 216.

[5] (Nov. 19, 1914), 19 Cal. App. Dec. 642. Rehearing denied Jan. 18, 1915.

[6] County of Yolo v. Knight (1886), 70 Cal. 431, 11 Pac. 662; Forbes v. Hyde (1866), 31 Cal. 342.

Digitized by Google

is open to question. In construing this section it has been held by the Supreme Court, in decisions which the court in Lima v. Lima fails to note, that the facts need not be set forth by positive averment in the affidavit but that it may "refer to and adopt" the complaint on file even though the latter be unverified. In such cases the oath to the affidavit is an oath to the contents of the complaint referred to.[7] In these cases the affidavit referred to the complaint and made it a "part and portion of this affidavit", specially adopting the contents of the complaint. It might be urged as a ground of distinction that the affidavit in Lima v. Lima did not adopt the complaint as part of the affidavit, for the reason that reference to an instrument does not amount to its adoption. On the other hand it may be contended that if the affidavit had been a will the reference in this case would have been sufficient incorporation.[8] The test as to incorporation by reference should be: do the words of incorporation show such a clear intent to incorporate the document as to make the party signing the affidavit guilty of perjury if the facts in the complaint are not true? In view of the fact that an affidavit for publication of summons is always ex parte, and that if sufficient in form the court is compelled to accept its statements as true,[9] the requirements of the code should be strictly followed.

C. R. S.

TRIAL: DIRECTING VERDICT UPON THE OPENING STATEMENT OF COUNSEL.—In the case of *Bias v. Reed*[1] the California Supreme Court held that a verdict might be directed upon the opening statement of counsel. Verdicts have been directed and nonsuits have been granted upon an attorney's opening statement in a few instances in California,[2] but the tendency of the court seems to be to discourage such procedure. In the principal case it is

---

[7] Ligare v. California Southern R. R. Co. (1888), 76 Cal. 610, 18 Pac. 777, supra, note 1, cited and followed in Pratt v. Stone (1900), 25 Nev. 365, 60 Pac. 514. In People v. Mulcahy (1910), 159 Cal. 34, 112 Pac. 853, the affidavit was similar to the one in Lima v. Lima and the court said, "He did not affirm directly or on information and belief that the facts alleged in the [unverified] complaint were true." But see McGilvery v. Morehead (1852), 2 Cal. 607, where it was held that an affidavit for arrest must contain a positive averment of facts. This strict rule may be distinguished on the ground that arrest and bail has always been strict and technical in its requirements, Mackenzie v. Mackenzie (1787), 1 Term Reports 716, 99 Eng. Repr. 1338. See also Ex parte Yonetaro Fkumoto (1898), 120 Cal. 316, 52 Pac. 726.

[8] Estate of Willey (1900), 128 Cal. 1, 60 Pac. 471. See 40 Cyc. 1094.

[9] Dunlap v. Steere (1891), 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361.

[1] (Dec. 17, 1914), 48 Cal. Dec. 583, 145 Pac. 516, in bank, adopting department decision, 47 Cal. Dec. 636.

[2] Emmerson v. Weeks (1881), 58 Cal. 382; Estate of McNeil (1909), 155 Cal. 333, 100 Pac. 1086.

Digitized by Google

said, "It is no doubt true . . . that the practice of directing a verdict, in advance of the introduction of evidence, upon the opening statement of one or the other party is a dangerous one and that an order granting such motion can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be".

In England the courts refuse to terminate a case upon the opening statement of counsel without his consent. In the case of Fletcher v. London and North Western Railway Company,[3] Lord Esher said, "In my opinion a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even with the greatest care, the evidence of the witnesses when they are called may differ from that which had been opened by counsel."

In Wisconsin the English view is followed, though it appears from the language of the leading case[4] that the rule was adopted in self-defense, as it were, owing to the fact that the state abounded in inexperienced practitioners. Undoubtedly the quality of the bar has improved since 1856, but the practice in question has remained unchanged.[5]

In Illinois the courts will not direct a verdict upon the opening statement of counsel unless it is shown in that statement that the case is founded upon a corrupt cause of action.[6] As there is no requirement that an attorney shall make any opening statement, it would seem that, having attempted such a statement, a non-suit should be granted or a verdict directed only in the clearest cases. There are cases where it would be an absolute waste of time and money to proceed with the introduction of evidence, as, for instance, where the attorney founds his case upon a contract which is against public policy,[7] or upon a cause of action which has not survived,[8] or upon a claim which is barred by the statute of limitations, the bar of the statute being pleaded.[9] On the other hand there are numerous instances where

---

[3] [1892] 1 Q. B. 122, 65 L. T. (N. S.) 605.

[4] Fisher v. Fisher (1856), 5 Wis. 472.

[5] Smith v. Commonwealth Ins. Co. (1880), 49 Wis. 322, 5 N. W. 804; Haley v. Western Transit Co. (1890), 76 Wis. 344, 45 N. W. 16.

[6] Pietsch v. Pietsch (1910), 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218 and note.

[7] Oscanyan v. Arms Co. (1880), 103 U. S. 261, 26 L. Ed. 539.

[8] Hey v. Prime (1908), 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570.

[9] Preusse v. Childwold Park Hotel Co. (1909), 134 App. Div. 383, 119 N. Y. Supp. 98. The defense of the statute of limitations is waived by a failure to plead it. Manning v. Dallas (1887), 73 Cal. 420, 15 Pac. 34.

Digitized by Google

the court should refuse to act until the evidence has been introduced. This is especially true of actions, as in most cases of fraud, in which the facts are complicated, and the issues numerous. Of course where an attorney is forced to rely to a great extent upon circumstantial evidence and hostile witnesses, and cannot tell exactly what he will be able to prove, the court should allow him to proceed with his case.[10]

No hard and fast rule upon the subject can be laid down, but the court must be guided by its own sound discretion in each particular case. Many cases fall clearly upon one side of the line or the other, but when a doubt arises it should be resolved against the directing of a verdict upon the opening statement of the attorney, and he should be permitted to put in his testimony and make out a case if possible. There is certainly great danger involved when the determination of a cause is made to depend upon an informal statement by counsel of what he deems to be the essential points of his case, rather than upon a consideration of the actual facts as brought out by the examination of witnesses.

E. J. S.

WATERS AND WATERCOURSES: CONSTITUTIONAL LAW: FORFEITURE OF RIPARIAN RIGHTS FOR NON-USER.—An important source of future litigation is to be found in the provisions of the recently enacted California Water Commission Act[1] declaring riparian rights forfeited after ten years non-user of the water, and also limiting riparian rights to such waters as are or may be reasonably needed for useful and beneficial purposes. Whether these provisions will stand, or must fall as an unconstitutional interference with vested rights, promises to become a hotly contested question; and what the outcome will be, no one can foretell with certainty.

A case of considerable interest in this connection is *In re Willow Creek*,[2] lately decided by the Oregon Supreme Court, and originally adjudicated by the State Water Commission under the Oregon Water Code.[3] There were numerous claimants, mostly appropriators; but one claimant, the Eastern Oregon Land Company, owned riparian lands, the title to which was derived from the federal government prior to the Desert Land Act of 1877.[4] It therefore possessed riparian rights,[5] according to the interpretation of that act by the Supreme Court of Oregon. It strenu-

[10] Darton v. Interborough Rapid Transit Co. (1908), 125 App. Div. 836, 110 N. Y. Supp. 171.

[1] (1913) Stat. Cal., 1012, § 11.

[2] (Oct. 21, 1914), 144 Pac. 505.

[3] Oregon Laws, 1909, p. 319.

[4] 19 Stats. at L. 377, U. S. Comp. Stats. (1913), §§ 4674-4680. For effect of that act on riparian rights in Oregon, see Hough v. Porter (1909), 51 Ore. 318, 98 Pac. 1083.

[5] Taylor v. Welch (1876), 6 Ore. 199.

Digitized by Google

ously questioned the constitutionality of the Water Code on various counts; but, since that code did not provide for the forfeiture of riparian rights because of non-user, as does the California act, the company lacked that basis of attack. Consequently, the question of the validity of such a provision was not presented. However, in determining the amount of water to which this riparian owner was entitled, the court dealt rather critically with riparian rights; and it is this fact which merits comment.

The court asserts that the Water Code does not destroy vested riparian rights, such as those of the Eastern Oregon Land Company, and that such rights can not be taken away by legislative enactment nor judicial decree; but holds that they are "subject to reasonable regulation". Instead of recognizing the riparian owner's right to an uninterrupted flow of the stream, undiminished except by the reasonable use of other riparian owners,[6] the court awarded it a definite amount of water, and decreed the surplus to subsequent appropriators, thus limiting a riparian owner's right in the stream, not to the uninterrupted flow thereof, but to the amount of water which might be put to beneficial use. Instead of permitting the riparian owner, on the plea of benefit to his lands, to claim all the flood waters of the stream, as against subsequent appropriators, however wasteful that ruling might be from an economic standpoint,[7] the court limited its right to the amount of water necessary to an economic irrigation of the land. Instead of recognizing the doctrine that a riparian owner's right is not, and cannot be, lost by non-use,[8] the court refused to award it more than it had put to use in the past, because "it had not shown that it desired or intended to use any more water, and had not shown what part of its other land was susceptible of irrigation." In other words, unless the riparian owner proved to the court that it intended or desired, or was capable of putting to beneficial use more than it had used in the past, its riparian rights would be in so far curtailed by non-user.

The language of the court, that "while vested water rights cannot be arbitrarily nor unreasonably interfered with by the Legislature", they are "subject to reasonable regulation", indicates that it relied on the police power in thus curtailing vested riparian rights. Is this reliance justifiable? And can the Cali-

---

[6] Hargrave v. Cook (1895), 108 Cal. 72, 41 Pac. 18. 30 L. R. A. 390; Miller & Lux v. Enterprise Canal & Land Co. (Feb. 19, 1915), 49 Cal. Dec. 251, 271, rehearing decided March 18, 1915.

[7] Miller & Lux v. Madera Canal & Irr. Co. (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A., (N. S.) 391; Wiel, Water Rights in Western States, 3rd ed., §§ 815-832, and cases cited.

[8] Wiel, 3rd ed., § 861; Sampson v. Hoddinott [1857] 1 C. B., (N. S.) 590, 87 Eng. Com. Law Rep. 590; Hargrave v. Cook, supra, note 6; Duckworth v. Watsonville Water & Light Co. (1907), 150 Cal. 520, 89 Pac. 338.

Digitized by Google

fornia courts in turn rely on the police power to sustain the forfeiture provision of the California Water Commission Act?

Of authority on these questions, there is very little, and what there is is inconclusive.[9] A Nebraska statute abrogating riparian rights on streams of over twenty feet in width was held unconstitutional.[10] The difference between such a statute and forfeiture for non-user is plain. In South Dakota it has been held that a statute providing for forfeiture for non-user after three years was a taking of property without due process of law.[11] But the holding is dictum; while a three year period might well have been held to give the riparian owner an unreasonably short time in which to put the water to use. In California there are conflicting dicta.[12] The cases in Colorado, Arizona, Wyoming and other states,[13] abrogating the riparian doctrine, do not offer much assistance, for they all take the ground that riparian rights had never become vested in those commonwealths, and hence do not go to the length of holding that vested water rights may be sacrificed to the public welfare.

When the validity of this provision of the California Water Act is brought before the California courts, the solution will have to be worked out on principle. It will be sought to sustain the provision as an exercise of the police power, following the suggestion in the case of In re Willow Creek. Whether this can be done is, to say the least, problematic. When it comes to forfeit-

---

[9] Numerous courts have construed statutes on the subject of water and water rights as not dealing with or impairing vested water rights. But none of those statutes purported to cover such rights, so that the question under consideration was not presented. Benton v. Johncox (1897), 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. 912; Farm Investment Co. v. Carpenter (1900), 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747.

[10] Clark v. Cambridge & A. Irr. Co. (1895), 45 Neb. 798, 64 N. W. 239.

[11] St. Germain Irr. Co. v. Hawthorn Ditch Co. (1913), 143 N. W. 124.

[12] Sloss, J., in Miller & Lux v. Madera Canal Co., supra, note 7, p. 65: "If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain." Henshaw, J., in Miller & Lux v. Enterprise Canal & Land Co. (1913), 47 Cal. Dec. 1, at p. 7: "It may well be that there is room for and even need for legislation which will require riparian proprietors to exercise their irrigation rights in the use of water within a limited period, or to be decreed to have waived those rights". On rehearing, (Feb. 19, 1915), 49 Cal. Dec. 251, this dictum was not repeated.

[13] Coffin v. Left Hand Ditch Co. (1882), 6 Colo. 443; Clough v. Wing (1888), 2 Ariz. 371, 17 Pac. 453; Drake v. Earhart (1890), 2 Idaho 750, 23 Pac. 541; Farm Investment Co. v. Carpenter, supra, note 9.

Digitized by Google

ing real property rights, such as water rights have been held to be,[14] and when the reason for such action is a mere negative failure to use the right, it will take an extremely progressive court to apply the doctrine of the police power. The use of real property has been curtailed, to promote the public health, safety and welfare, in cases too numerous to be cited here; and there are many cases where personal property has been destroyed.[15] But in all those cases the property was a positive menace to the public. Such can scarcely be said of a non-used water right; it is not a positive nuisance.[16].

On the other hand, the argument for the exercise of the police power in this situation has been suggested by the Supreme Court of Washington, although only by way of dictum.[17] "It is not to the state's interest that the water of non-navigable streams should be idle or going to waste because one of its citizens having a preference right to its use unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to their arid lands".

H. J. W.

WILLS: REVOCATION: ATTEMPTED REVOCATION PREVENTED BY FRAUD OR UNDUE INFLUENCE.—Where a testator has been prevented by fraud or undue influence from revoking his will, can equity aid the injured parties? The English Statute of Wills and statutes patterned after it expressly enumerate the requisites of a valid revocation.[1] Some American statutes make express provision for fraud used in securing a revocation,[2] but both the English and the American statutes wholly fail to provide for relief against fraud used in preventing revocation. It has therefore been uniformly decided under these statutes that the use of fraud or force to prevent a testator from revoking his will cannot itself operate as a revocation.[3] The will stands, and must be probated as if no fraud had occurred. Title passes by operation of law and equity will not interrupt its passage.[4]

---

[14] St. Helena Water Co. v. Forbes (1892), 62 Cal. 182.

[15] Newark & S. O. H. Ry. Co. v. Hunt (1888), 50 N. J. L. 308, 12 Atl. 697; Dunbar v. City Council of Augusta (1892), 90 Ga. 39, 17 S. E. 907.

[16] See Gaines v. Buford (1833), 31 Ky. 481.

[17] State ex rel. Liberty Lake, etc. Co. v. Superior Court (1907), 47 Wash. 310, 91 Pac. 968, at p. 970. See also Little Walla Walla Irr. Union v. Finis Irr. Co. (1912), 62 Or. 348, 124 Pac. 666, 668.

[1] Stats. 7 Wm. IV & 1 Vict. (1837), c. 26, § 20; Cal. Civ. Code, § 1292.

[2] Cal. Civ. Code, § 1272.

[3] Estate of Silva (Jan. 6, 1915), 49 Cal. Dec. 40, 145 Pac. 1015; Doe d. Reed v. Harris (1837), 6 Ad. & E. 209, 33 Eng. Com. Law Rep. 129.

[4] Bohleber v. Rebstock (1912), 255 Ill. 53, 99 N. E. 75; see 7 Ill. Law Rev. 388.

Digitized by Google

There is a general maxim in equity, however, that no one can take advantage of his own wrong.[5] An illustration of this principle is to be found in the case of an heir or devisee who murders his ancestor or testator in order to acquire his property. Although there are authorities which hold that in such a case title passes to the murderer absolutely, and others that it does not pass at all, there are still others that permit him to take only as trustee for the parties next interested.[6] Again, it is unquestioned that a grantee under a deed induced by force or fraud takes subject to a trust in favor of the grantor.[7] And, conversely, where the defrauding party has by his fraud prevented the execution of a deed by his ancestor or predecessor, and as a result has acquired the property by descent or succession, it was decided by Lord Thurlow and approved by Lord Eldon, that he holds as trustee for the person intended to be the grantee.[8]

These and other cases that may be found seem to point to the conclusion that in the case first put equity should and can aid the injured parties. The beneficiary under a will, the revocation of which has been prevented by fraud or undue influence, should take subject to a trust *ex maleficio* in favor of the heirs.

In *Estate of Silva*,[9] the court intimates that equity might recognize such a remedy. Similar intimations have previously come from the bench,[10] and are approved by text writers.[11] There is one case, Kent v. Mahaffey,[12] that flatly refuses to recognize such an equity, but it appears to lie outside of the regular current of opinion, and has been unfavorably criticized.[13] It must be admitted that a fairly careful search of the authorities has failed to disclose a single case where such a trust in the particular circumstances under consideration was actually enforced. However, allegations

---

[5] Cal. Civ. Code, § 3517.

[6] Ellerson v. Westcott (1896), 148 N. Y. 149, 42 N. E. 540; Wellner v. Eckstein (1908), 105 Minn. 444, 117 N. W. 830; see also article by Prof. James Barr Ames in 36 Am. Law Reg. & Rev. (N. S.) 225, and comment thereon by Prof. Orrin Kip McMurray in 2 Cal Law Rev, 251; article by F. F. Thomas, Jr., in 1 Cal. Law Rev. 397; 4 Harv. Law Rev. 394; 8 Harv. Law Rev. 170 (similar result in the Civil Law); 30 Am. Law Rev. 130; 6 Green Bag 534; similar reasoning where insured is murdered by his beneficiary, article by F. F. Thomas, Jr., in 1 Cal. Law Rev. 513; 24 Harv. Law Rev. 227.

[7] Crosby v. Clark (1901), 132 Cal. 1, 63 Pac. 1022.

[8] Luttrell v. Olmius, stated by Lord Eldon in Mestaer v. Gillespie (1805), 11 Ves. Jr. 622, 638, 32 Eng. Repr. 1230, 1236.

[9] (January 6, 1915), 49 Cal. Dec. 40, 145 Pac. 1015.

[10] Gains v. Gains (1820), 9 Ky. 190, 12 Am. Dec. 375; Blanchard v. Blanchard (1859), 32 Vt. 62; see Graham v. Burch (1891), 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

[11] Page on Wills, 287; 2 Roberts Wills 3rd ed., 31; 7 Ill. Law Rev. 388.

[12] (1859), 10 Ohio St. 204, 212.

[13] See article by Prof. Ames, 36 Am. Law Reg. & Rev. (N. S.) 225, cited above.

Digitized by Google

that a testator was fraudulently prevented, not from revoking, but from republishing his will, were held by Lord Thurlow in 1787[14] to state grounds for equitable relief, and the reasoning was at later times approved by Lord Eldon in three cases involving the same general principle.[15]

It is unfortunate that in most of the cases where the point might have been raised, counsel for the injured parties proceeded upon the assumption, the statutes of wills notwithstanding, that the fraud itself should operate as a revocation, and failed to bring the equitable issue before the court. In others, all parties seem to have confused the legal and the equitable aspects of the question, assuming that because the statute must be applied to the case, equity cannot enforce a principle which is almost as old as the law, broader than any statute of wills, and generally not provided for nor even considered in such statutes at all.

That the law should concede its impotence to intercept the enjoyment of property acquired by fraud is only in degree less shocking than that it should permit itself mechanically to execute the design of a devisee who murders his testator. The fact that the statute expressly makes fraud in the execution of a will, codicil, or revocation a ground for denying or revoking probate, is no reason for saying that it thereby denies all relief for fraud committed in other transactions concerning wills. It is apparent that there are many cases of fraud upon testators where the legislature, if it had had that particular case before it, would obviously not have made the law an engine of wrong. But, wisely, no attempt is made in the statute to enumerate such cases, for who can anticipate them all? That is left for the courts, when each case arises. "No one can take advantage of his own wrong."[16] The general enforcement of such fundamental principles is one of the marks of our graduation from an age of formalism in legal administration which could conceive of the goddess of justice as blindfolded.

O. F. M.

---

[14] Dixon v. Olmius (1787), 1 Cox 414, 29 Eng. Repr. 1227.

[15] Mestaer v. Gillespie (1805), 11 Ves. Jr. 622, 638, 32 Eng. Repr. 1230, 1236, cited above; Huguenin v. Baseley (1807), 14 Ves. Jr. 273, 290, 33 Eng. Repr. 526, 532; Middleton v. Middleton (1819), 1 Jac. & W. 94, 96, 37 Eng. Repr. 311, 312; see also In re McCallum (1901), 1 Ch. Div. 143, 154.

[16] Cal. Civ. Code § 3517.

Digitized by Google

Book Reviews

MODERN AMERICAN LAW. A COMMENTARY ON THE FUNDAMENTAL PRINCIPLES OF AMERICAN LAW AND PROCEDURE, ACCOMPANIED BY LEADING ILLUSTRATIVE CASES. Prepared under the editorial supervision of Eugene Allen Gilmore, A. B., LL.B. Blackstone Institute, 20 West Jackson Boulevard, Chicago, Ill. 1914. Vol. I, pp. xxxv, 922; vol. II, pp. xxvii, 915; vol. III, pp. xxxi, 850; vol. IV, pp. xxx, 880, vol. V, pp. xxxix, 995; vol. VI, pp. xxxii, 921; vol. VII, pp. xxx, 844; vol. VIII, pp. xxix, 787; vol. IX, pp. xxvii, 833; vol. XI, pp. xxvi, 812. $60.00 per set of fifteen volumes.

These volumes are prepared primarily for the Blackstone Institute Correspondence Law School. Instinctively the thought arises that a student can learn very little in the practical application of the law from the mere reading of text books. The Blackstone Institute recognizes this by supplementing its treatises with guides, lectures and problems. The purposes of the Institute are to provide a sound legal training for those students of the law who are unable to attend a law school, and to furnish to business men a knowledge of legal principles that will enable them to conduct their business with greater assurance and success. There will doubtless be a wide difference of opinion as to the practicability of the accomplishment of these ends.

The volumes, however, have an independent value for the lawyer apart from their use in correspondence teaching. The name of the Editor-in-Chief, Eugene Allen Gilmore, Professor of Law in the University of Wisconsin, is a sufficient guarantee that the work is well done. He has selected a list of specialists on the subjects covered. Among the contributors from the University of California are, William Carey Jones, Barry Gilbert, William E. Colby and John Wurts, exchange professor from Yale. Each volume presents a concise text book on certain branches of the law with illustrative cases at the end of each volume. A fuller treatment would be desirable in some cases, notably in the article on water rights and irrigation where the treatment of the riparian doctrine is far too fragmentary to be of real value. On the whole, however, it may be fairly said that these treatises present a well rounded view of the law of today from the enlightened point of view that comes from a thorough familiarity with the history of the law and with jurisprudence.

Modern American Law is well adapted to the use of the lawyer or student who wants not a mere statement of rules but an explanation of underlying principles, illustrated by an application to actual cases. It is not, of course, intended as a sub-

Digitized by Google

stitute for the encyclopedias. The scope is narrower, in that it does not aim to include all the case law on every subject. The scope is broader, in that it is not so rigorously tied down to decided cases but unfolds the scientific principles of the law on which the cases are based and which should govern new combinations of facts as they arise. There could be no greater misnomer than to apply the term corpus juris to an encyclopedia which purports to include within its scope the bewildering and myriad precedents of case law on every subject. The term should rather be applied to an orderly statement of the fundamentals, bringing under one common principle those rules which historical accident may have kept apart, ignoring local and temporary aberrations and surveying the subject with a philosophic grasp of its past, present and future. We have not such a corpus juris at present. Perhaps the nearest approach to it is Modern American Law.

Too much praise can hardly be given to the typographical features. The volumes are bound in morocco with flexible covers, and are of convenient size. The paper is thin but opaque, and the type is a positive delight to the eye.

A. M. K.

COMMON SENSE IN LAW. By Paul Vinogradoff. Henry Holt and Co., 34 W. 33rd St., N. Y. 1914. pp. 256. $.50.

This is one of the Home University Library Series and is designed to afford the general reader the knowledge he would like to have on subjects of living and permanent interest. This particular volume may be termed an attempt to justify the ways of law to men. It is a work sadly needed and the author has done it well. "Although the details of legal rules are complicated and technical, the operations of the mind in the domain of law are based on common sense, and may be followed without difficulty by persons of ordinary intelligence and education". In these words the author makes clear at the outset that the general principles of the law are rational and simple, while the solution of particular concrete cases can be worked out only by the trained lawyer. In other branches of human knowledge this distinction is readily understood. The layman with the average knowledge of the principles of physics and mathematics does not feel himself competent to build a bridge across San Francisco Bay, or to design a dreadnaught. In law, strangely enough, laymen, both educated and uneducated, seem to hold the notion that all legal controversies reduce themselves in the last analysis to a fundamental difference between right and wrong, which could be solved intuitively by any fair minded person, if the lawyers, for their own benefit, had not interposed a lot of arbitrary and useless technicalities to defeat justice. A careful reading of this book will show the layman the inherent difficulties of the

Digitized by Google

problems lawyers are called upon to solve and the reasonableness of the solutions in general. To obtain a conception even of the general principles of the law will require from the layman some mental effort. There is no royal road in law any more than in mathematics or philosophy, but the author has made the way as easy as possible.

A lawyer's familiarity with the subject matter will make the book simple reading and yet well worth while, for the author has presented in an attractive manner the unifying theory of jurisprudence which is so lacking in the education of the American lawyer. This is not done by a formal and repellent abstract analysis, but by apt illustrations which flow so easily from the author's scholarly knowledge of comparative law. What is the aim of the law? Is it, as Ihering stated, to delimit interests, or is it as the author would have "to regulate the attribution and exercise of power over persons and things in social intercourse". One who reads the author's interesting chapter on this subject can hardly resist pursuing the controversy further. We need more books like this.

A. M. K.

TRIAL OF JOHN ALEXANDER DICKMAN. Edited by S. O. Rowan-Hamilton. Notable Trial Series. William Hodge & Co., 12 Bank St., Edinburgh, Scotland. 1914. pp. viii, 208, 5s net.

This is an interesting and valuable series which should be a part of every law library. The testimony in each case is given in narrative form, all exhibits are printed in full with facsimiles of the handwriting where necessary. Each volume contains an introduction and other helpful editorial matter. The value of such a series for future generations can hardly be overestimated. The importance, however, is not confined to the future. These tales of actual crime surpass in interest the ever popular detective stories of fiction. Few novels offer the fascinating study in criminal psychology presented by the fatal infatuation of Mary Blandy, or by the marvelous self-possession of Madeleine Smith, both trials included in the volumes already published.

For the lawyer, to the charm of the mystery there is added the keen intellectual enjoyment derived from the development of the case by the actual examination of the witnesses, by the arguments of skilled counsel, and by the summing up of able judges. For the student, such trials would seem well adapted for study in conjunction ith Professor Wigmore's Principles of Judicial Proof. The ..ruction of an argument from the testimony and exhibits of an interesting case is a practical legal study of no small advantage. The trial of Dickman, hanged on circumstantial evidence for a murder committed in a railway compartment, was given in full in 45 American Law Review 641, as an example of modern English trial methods. It certainly contains many points

Digitized by Google

of superiority to the average American trial. At the same time, however, there is a noticeable want of fairness in certain respects. Let us hope that the defects in American criminal trial procedure may be remedied without catching the diseases of English practice.

From the matter *dehors* the record given in the introduction, it is apparent that England, as well as the United States, is suffering from what an English judge termed "the substitution of trial by newspaper for trial by jury." The editor remarks, "Dr. Crippen and, to a lesser extent, John Dickman were both convicted before they were placed in the dock."

A. M. K.

THE PEOPLE'S LAW. By William Jennings Bryan. Funk & Wagnalls Co., 354-360 4th Ave., New York. 1914. pp. 64. $.30.

This is an address by Mr. Bryan delivered before the Constitutional Convention at Columbus, Ohio. The wisdom of the people of California in rejecting a call for a constitutional convention is apparent on reading this address. The advice there given is to include the initiative on the petition of a small number of voters, the referendum, the recall of all officers including judges, popular election of judges, amendment of the constitution by majority vote, and public service regulation. We have them all in California. It is gratifying to local pride to learn that we are living under a model constitution. When the other suggestions in the speech, such as the guarantee of bank deposits, are incorporated, how does such a constitution differ from other written law?

It would be interesting to have Mr. Bryan's opinion of direct legislation in California where at the last election the people voted on forty-eight propositions, including such technical, complex and lengthy matters as a complete water code and a Torrens Act. Nothing, however, could disturb the serene faith of Mr. Bryan in the power of a majority vote to settle right all disputed questions in philosophy, law, and science. What a surprise there will be to some if the people should decide that, after all, there are other ways of ascertaining truth than by counting heads. The absurdity of voting in ignorance on subjects which can be understood only after months of expert study, is already provoking discontent. Let us hope the reaction will not lead to the entire withdrawal of the people from political turmoil and agitation as pictured in Kipling's tale of 2150 A. D., "As Easy as A B C".

A. M. K.

THE ANTI-TRUST ACT AND THE SUPREME COURT. By William Howard Taft. Harper and Brothers, Franklin Square, N. Y. 1914. pp. 133. $1.25 net.

The time is ripe for gathering together the recent decisions under the Sherman-Anti-Trust Act and no one is better qualified

Digitized by Google

to perform this duty than Ex-President Taft. As the author of the opinion of the Circuit Court of Appeals in the celebrated Addyston Pipe Company Case, subsequently affirmed by a unanimous Supreme Court, and for years identified closely with the administration of the act, he speaks with clear authority. In this monograph he has given us, in brief compass, an appreciative commentary upon the law, with special reference to its more recent development.

The first two chapters serve as an effective introduction to Chapter three, which is devoted to the Knight decision and its demoralizing effect upon the subsequent conception and administration of the law. Mr. Taft's frank and incisive criticism of this case, his true appreciation of the court's warped perspective, make the treatment peculiarly informative. In this day it seems singular in the extreme that the court in the Knight case could not perceive that the monopolization of the production of sugar carried with it a monopolization of its interstate transportation. "The man in the street knew that the acts set forth in the bill were part of a plan to monopolize interstate trade in sugar. Why should the court have refused to see it?" Due note is made of the interesting fact that Mr. Justice Harlan's dissent in the Knight case represents the law to-day.

Following a review of intermediate decisions, the Standard Oil and Tobacco Cases properly claim attention at some length. This chapter, in conjunction with those following, has been prepared as an avowed *apologia* for the current construction of the statute—the "rule of reason", which has been the subject of much misapprehension. It is truly pointed out that the pronouncement of the rule of reason has not devitalized the statute nor in fact narrowed its scope, neither has it given encouragement to those who would set the law at naught. As evidence that the efficiency of the statute is unimpaired, ten cases immediately following the Standard Oil and Tobacco Decisions are reviewed and the conclusion is reached that the law has effectively been applied to all manner of combination and conspiracy in restraint of trade. The decisions justify the claim that the law has proved an apt remedy for all trust evils, irrespective of the form in which they may be masked.

Mr. Taft has the rare gift of exact and concise statement, and in this treatise his talent has been employed to great advantage. Popular and yet professional in treatment, his discussion of the law will appeal alike to the layman and the lawyer. It would be difficult to challenge Mr. Taft's conclusion that the Sherman Act, by the very fact of "its general and widely inclusive range, which embraces every form of scheme to suppress competition and control prices and effect monopolies" is entirely adequate for current needs.

A. P. M.

Digitized by Google

Books Received

THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES. Enlarged edition. By William Patterson Borland. Vernon Law Book Co., 806 Grand Ave., Kansas City, Mo. 1915. pp. xv, 723. $6.00.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT. By Sir William Anson, Bart., D. C. L., 11 English edition, Second American copyright edition, edited by Ernest W. Huffcut. Banks Law Publishing Co., 23 Park Place, N. Y. 1907. pp. li, 462.

PROCEEDINGS OF THE EIGHTH ANNUAL CONFERENCE OF THE NATIONAL TAX ASSOCIATION. National Tax Association, Madison, Wis. 1914. pp. 499. $3.00.

INSURANCE LAW OF NEW YORK. Amasa J. Parker, Jr. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. 443 and text of Chapter 28, General Corporation Law of 1909. $3.00.

ANNOTATED RULES OF PRACTICE IN THE UNITED STATES FEDERAL COURTS. By Wm. Whitwell Dewhurst, 2nd ed. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. vii, 951. $6.50.

BANKING LAW OF NEW YORK. By Amasa J. Parker, Jr. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. vi, 547. $3.50.

COMMENTARIES ON THE LAW OF ENGLAND BY SIR WILLIAM BLACKSTONE. By George Chase, 4th ed. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. xxi, 1148. $6.50.

THE HISTORY AND PRESENT POSITION OF THE BILL OF LADING AS A DOCUMENT OF TITLE TO GOODS. By W. P. Bennett, L. L. D. Cambridge University Press, (G. P. Putnam's Sons), 2-6 W. 45th St., New York. 1914. pp. viii, 101. $1.25.

HISTORY OF ROMAN PRIVATE LAW. By E. C. Clark. Cambridge University Press, (G. P. Putnam's Sons), 2-6 W. 45th St., New York. 1914. pp. xiv, 802, in two volumes. $6.75.

CONCISE LAW DICTIONARY. By Frederic J. Stimson. Little, Brown & Co., 34 Beacon St., Boston, Mass. 1911. pp. 344. $3.00.

THE INCOME TAX. By Edwin R. A. Seligman. The Macmillan Co., 64-66 Fifth Ave., New York. 1914. pp. xi, 743. $3.00.

A TREATISE ON THE LAW AND PRACTICE OF BANKRUPTCY. By Henry Campbell Black. Vernon Law Book Co., 806 Grand Ave., Kansas City, Mo. 1914. pp. xxv, 1852. $9.00.

A TREATISE ON THE LAW OF HOMICIDE. By the Editorial Staff of the Michie Company. The Michie Company, Charlottesville, Va. 1914. pp. xxxii, 2088, in two volumes. $13.00.

THE LAW OF ELECTRICITY. By Arthur F. Curtis. Matthew Bender & Co., 109 State Street, Albany, N. Y. 1915. pp. lxxxiv, 1033. $7.50.

Digitized by Google

California Law Review

Volume III. JULY, 1915 Number 5

The Beginnings of the Community Property System in California and the Adoption of the Common Law

IN A PREVIOUS volume of this Review appeared an article by Mr. Walter Loewy upon The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California.[1] This article traced the origin and stated the main principles underlying the Spanish-Mexican system of community of goods, but did not undertake the task of following the development of the system after its adoption by the first legislature of California. It is proposed to trace its history in that State from the American occupation until the present day, discussing the principal authorities upon the subject.

The early history of the community property system is so closely interwoven with that of the story of the adoption of the common law as the basis of the jurisprudence of the State that it is necessary to say something concerning that story. The present article will deal with the adoption of the common law and of the community system by the State of California.

I

The peculiar character of the American settlement of California casts a flood of light upon the history and nature of many of her legal institutions. Never, perhaps, in the history of the United States, has there been such a rapid transformation of national life and character as that which California experienced within a very brief period after Marshall's discovery of gold on Sutter Creek. The population leapt at a bound from 26,000, on January 1, 1849, of whom 8,000 were Americans, to 107,069, on

[1] 1 Cal. Law Rev. 32.

Digitized by Google

January 1, 1850, of whom 76,069 were Americans.[2] And this population, made up of active men in the prime of life from every part of the country, brought with it ideas and habits of thought far indeed removed from those of the native Californian and Mexican people who were the former possessors of the land. The rude institutions that served well enough for a pastoral people living in a sparsely settled community, whose disputes, if any arose, the alcalde or justice of the peace, administering a patriarchial justice, summarily adjusted, were wholly unsuited for Americans, accustomed to regularly constituted courts and statutory law.

The consequence of this condition of things was that, though theoretically the law of the conquered country remained, under well settled principles of international law, unchanged until superseded by statute, practically, the majority of the population of the new territory regarded themselves as bound in their legal relations by the common law of England, modified by American tradition, rather than by the civil law of Spain and Mexico. Even the most conservative of the new settlers, in so far as they observed any system as controlling, ignored the civil law and treated the common law as their rule of conduct, both as private citizens and as magistrates exercising judicial functions. Thus, though no trial by jury was recognized by the native law, the Rev. Walter Colton, the first newspaper editor in California and the first American alcalde at Monterey, called a jury in serious criminal cases.[3] How vague and undefined was the

---

[2] The figures are taken from the "Memorial to Congress," presented by the Senators and Representatives elected from California, praying for admission of the State into the Union. Browne, Debates in the Convention of California, Appendix, pp. XXII and XXIII.

[3] Colton, Three Years in California, p. 47. The account of this first jury trial may be of interest. "Friday, Sept. 4 (1846). I empannelled today the first jury ever summoned in California. The plaintiff and defendant are among the principal citizens of the country. The case was one involving property on the one side, and integrity of character on the other. Its merits had been pretty widely discussed, and had called forth an unusual interest. One-third of the jury were Mexicans, one-third Californians, and the other third Americans. This mixture may have the better answered the ends of justice, but I was apprehensive at one time it would embarrass the proceedings; for the plaintiff spoke in English, the defendant in French, the jury, save the Americans, Spanish, and the witnesses all the languages known to California. But through the silent attention which prevailed, the tact of Mr. Hartnell, who acted as interpreter, and the absence of young lawyers, we got along very well. The examination of the

Digitized by Google

legal and judicial system appears from Mr. Colton's description of his jurisdiction. He says in his journal, under date of September 15, 1846,[4] in speaking of his election as alcalde by the citizens of Monterey, a position he had already been filling for two months under a military commission:

> "Their election . . . . devolves upon me duties similar to those of mayor of one of our cities, without any of those judicial aids which he enjoys. It involves every breach of the peace, every case of crime, every business obligation, and every disputed land title within a space of three hundred miles. From every other alcalde's court in this jurisdiction there is an appeal to this, and none from this to any higher tribunal. Such an absolute disposal of questions affecting property and personal liberty never ought to be confided to one man. There is not a judge on any bench in England or the United States, whose power is so absolute as that of the alcalde of Monterey."

Mr. Colton's notions of his jurisdiction were far more exalted than the Mexican law of 1837 would seem to give him justification for asserting. As a matter of fact the alcalde was, so far as the written law went, vested with hardly any functions which we would call judicial. He might fine vagrants to the extent of $25 or four days' imprisonment, and he might, in very urgent cases, take the first steps in criminal proceedings.[5] But the judicial power was for the most part vested in higher courts.

---

witnesses lasted five or six hours; I then gave the case to the jury, stating the questions of fact upon which they were to render their verdict. They retired for an hour, and then returned, when the foreman handed in their verdict, which was clear and explicit, though the case itself was rather complicated. To this verdict both parties bowed without a word of dissent. The inhabitants who witnessed the trial, said it was what they liked—that there could be no bribery in it—that the opinion of twelve honest men should set the case forever at rest. And so it did, though neither party completely triumphed in the issue. One recovered his property, which had been taken from him by mistake, the other his character, which had been slandered by design. If there is anything on earth besides religion for which I would die, it is the right of trial by jury."

[4] Colton, Three Years in California, 55.

[5] Law of March 30, 1837, translated in Appendix to Browne's Debates in the Convention of California, Part I, § VI, and Part II, sec. III. pp. xxxiii and xxxviii. This translation was made under the authority of General Riley, Military Governor of California, by W. E. P. Hartnell, with introduction and notes by J. Halleck. It was not issued until July 2, 1849, too late to have much influence upon the jurisprudence of the State. A brief account of the judicial systems before 1850 may be found in the Preface to volume 1 of the California Reports.

Digitized by Google

The written law provided for judges of first instance and for a superior tribunal, but the written law seems not to have been known in upper California in 1846.[6] Mr. Colton did not hesitate to impose the death penalty, though he would have been hard put to it to justify his jurisdiction by written law.[7]

It is true, he speaks of his powers as alcalde and of his administration of the law as if he acted under a regular code. Thus he says, under date of July 22, 1847:[8]

> "The laws by which an alcalde here is governed, in the administration of justice, are the Mexican Code as compiled in Frebrero(sic) and Alverez(sic)—works of remarkable comprehensiveness, clearness and facility of application. They embody all the leading principles of the civil law, derived from the Institutes of Justinian. The common law of England is hardly known here, though its rules and maxims have more or less influenced local legislation. But with all these legal provisions a vast many questions arise which have to be determined *ex cathedra*. In minor matters the alcalde is often himself the law; and the records of his court might reveal some very exquisite specimens of judicial prerogative; such as shaving a rogue's head—lex talionis—who had shaved the tail of his neighbour's horse; or making a busy body, who had slandered a worthy citizen, promenade the streets with a gag in his mouth."

Notwithstanding the encomiums lavished upon Febrero and Alvarez, the description of their works and the spelling of their names must leave some doubt in the reader's mind as to how far the worthy alcalde of Monterey had explored the law contained in their tomes. The instances cited in the pages of his journal certainly show more of the style of justice administered by Sancho Panza in his famous island city of Barataria than of that expounded in the Institutes of Justinian or the Commentaries of Blackstone.

Alcalde Stephen J. Field at Marysville in 1849 understood the limits of his jurisdiction better than Alcalde Colton in Monterey, but he administered justice in much the same way.

---

[6] The oath of office was administered to Governor Burnett by "Chief Justice" K. H. Dimmick, on December 20, 1849. Journals, Legislature of California, 1850, 20. Bancroft says Mr. Dimmick was judge of the Court of First Instance of San Jose. 6 Bancroft, History of California, 310.

[7] Colton, 232.

[8] Id. 249.

Digitized by Google

Justice Field in his very interesting Personal Reminiscences says:[9]

> "Under the Mexican law Alcaldes had, as already stated, a very limited jurisdiction. But in the anomalous condition of affairs under the American occupation, they exercised almost unlimited powers. They were, in fact, regarded as magistrates elected by the people for the sake of preserving public order and settling disputes of all kinds. In my own case and with the approval of the community I took jurisdiction of every case brought before me. I knew nothing of Mexican laws, did not pretend to know anything of them; but I knew that the people had elected me to act as a magistrate and looked to me for the preservation of order and the settlement of disputes and I did my best that they should not be disappointed. . . . . In civil cases, I always called a jury if the parties desired one; and in criminal cases when the offence was of a high grade, I went through the form of calling a grand jury and having an indictment found; and in all cases I appointed an attorney to represent the people, and also the defendant, when necessary.[10] The Americans in the country had a general notion of what was required for the preservation of order and the due administration of justice; and as I endeavored to administer justice promptly, and upon a due consideration of the rights of every one, and not rashly, I was sustained with great unanimity by the community."

A German writer preparing a careful descriptive pamphlet guide for prospective settlers, in 1849, says:[11]

> "The country possesses no written law book, with the exception of the Laws of Spain and the Indies, published in Spain a hundred years ago, and a little pamphlet, setting forth the duties of various judicial officers, which was published by the Mexican government since the revolution. When one of the last of the Mexican governors was approached

---

[9] Field, Personal Reminiscences, (not published, but privately printed,) 27, 30.

[10] Field was more liberal in this respect than was Colton. The latter writes, at p. 199 of the work before cited: "We have at this time three young lawyers in Monterey, as full of legal acuteness as the lancet cup of a phlebotomist. All want clients and fees, and the privilege of a practice in this court. Mexican statutes, which prevail here, permit lawyers as counsel but preclude their pleas. They may examine witnesses, sift evidence but not build arguments. This spoils the whole business and every effort has been made to have the impediment removed, and the floodgate of eloquence lifted. I should be glad to gratify their ambition, but it is impossible. I should never get through with the business pressing on my hands in every variety of shape which civil and criminal jurisprudence ever assumed."

[11] Oszwald, Californien und seine Verhältnisse, Leipzig, 1849, 71.

Digitized by Google

> by a judge for instructions upon the way he should administer the law in his district, he answered: 'Administer it in harmony with the fundamental principles of the law of nature and of justice!' And this is, in fact, the basis of California jurisprudence."

Mr. E. O. Crosby tells us that "Spanish law was in operation here and there," but that "it was an unknown system to our people."[12] The decisions of the courts in 1849 are hardly to be counted as judicial decisions. As to the legal situation in general, he says:[13]

> "The fact is that the application of the common law in deciding cases was made in direct violation of the old Spanish law. The Spanish civil law was so little known that the proceedings were not conducted under its provisions. Not many of the old Spanish officers were retained, a few in some of the Southern counties. In fact there was very little law of any kind, very few courts and very little proceedings during the first year of the emigration to California. The first vessel arrived in February, 1849, and in December of that year we organized the Supreme Court under the State organization."

II

So strong, indeed, was the predisposition of the majority of the people towards common law ideas and legal institutions that even official expressions denying the validity of the Spanish Mexican law may easily be found. In the elaborate report of the judiciary committee of the Senate in the legislature of 1850, recommending the adoption of the common law as the basis of our jurisprudence, an able document submitted by Mr. E. O. Crosby, the chairman of the committee,[14] it was argued that the civil law of Spain and Mexico was not then in force. This document is entitled to serious consideration not only by reason of its intrinsic merit but by reason of the character of its authorship. Mr. Crosby was a man whose opinions command respect. He was an educated lawyer, from New York City, an examiner in chancery in the Chancery court of that State, and had been in the active practice of his profession in New York City for several years. Coming to California, in part for his health, and in

---

[12] MSS. by Elisha O. Crosby in Bancroft Library entitled, Events in California, 41.

[13] Id. 132.

[14] Journals, Legislature of California, 1850, 459-480.

Digitized by Google

part to report to clients upon the business situation here, he found such a good field that he decided to remain. He was Prefect of the District of Sacramento under Governor Riley, a member of the constitutional convention of 1849, a member of the Senate of 1850 and the chairman of the judiciary committee of that body.[15] He remained in California for a decade, in very extensive practice in connection with the prosecution of land claims. Returning to New York, he was appointed by President Lincoln as Minister to Guatemala. In the preparation of the report upon the common and civil law, he tells us that he was assisted by Nathaniel Bennett, one of the justices of the Supreme Court of California, appointed by the legislature at its first session,[16] a very scholarly and capable lawyer whose decisions alone, among the earliest justices, show any considerable acquaintance with the Spanish Mexican system.

The views expressed in the report are, therefore, entitled to more than ordinary respect, as the work of such competent and cool headed men. Yet these conservative men say:[17]

> "We wish to remark at the outset that we by no means concede the position that the civil law is in full force in this State at the present time. It is extremely uncertain to what extent it ever did prevail. Situated at so great a distance from the Mexican capital, occupying months in the interchange of communication with that central point of law and legislation, connected with it by the fragile tie of common descent, rather than by any intimate communion of interests or sympathy of feeling, exposed to frequent revolutions of the general and departmental governments, finding but little stability in the Mexican Congress, little convenience for the promulgation of its laws, and less power to enforce them, the people of California seem to have been governed principally by local customs, which were sometimes in accordance with the civil law, sometimes in contravention of it. However this may be, it is very certain that it now prevails to but a limited extent and equally certain that the common law controls most of the business transactions of the country. The American people found California a wilderness—they have peopled it; they found it without commerce or trade—they have created them; they found it without courts—they have organized them; they found it

[15] Crosby, Events in California, 2, 3, 26.
[16] Journals, Legislature of California, 1850, 48-55.
[17] Journals, Legislature of California, 1850, 474-5.

Digitized by Google

> destitute of officers to enforce the laws,—they have elected them; they found it in the midst of anarchy—they have bid the warring elements be still, have evoked order out of confusion, and from the chaotic mass have called forth a fair and beautiful creation. Throughout all this, they have taken the common law, the only system with which they were acquainted, as their guide. Their bargains have been made in pursuance of it—their contracts, deeds and wills have been drawn and executed with the usual formalities—the courts have taken its rules to govern their adjudications—their marriages have been solemnized under it—and, after death, their property has been distributed as it prescribes. Are you to hold all or a great portion of these things as naught? Will you overturn or invalidate the immense business transactions of a great community? And yet to this you must come if you say that the civil law is in force throughout the State The first settlers of the United States brought with them from the mother country the common law and established it in an uninhabited region. The emigrants to California have brought with them the same system, and have established it in a country almost equally unoccupied. If a change, therefore, is made, it must be a substitution of the civil law in place of the common law. If you sanction the latter by legislative enactment, you only give your authority to what had already been done in anticipation of such authority."

Official expression denying the force of the Mexican law is found two years later in the case of Fowler v. Smith,[18] where Justice Murray held, upon the first hearing, that a conveyance made in January, 1850, three months before the formal adoption by the legislature of the common law, by one American to another was to be governed by the common, not the civil law, with respect to the question of implied warranty, and that the Mexican statutes with respect to usury had ceased to be in effect at that date, though the formal act of abolition was passed on April 22, 1850. The reasoning of the court seems to leave open the question as to whether or not the transaction, if it had been between native Californians or Mexicans, would have been governed by the civil law. The learned justice points to the condition of Italy and Gaul, after the overthrow of the Roman Empire of the West, with its system of personal law, as distinguished from territorial law, governing the rights of the various peoples, Roman law for Romans, Lombard law for the Lombards, Salic law for

[18] (1852) 2 Cal. 39.

Digitized by Google

the Salian Franks. He also cites the situation in India, the modern example of a system of personal law, and refers to the situation in Gibraltar where, he says, the English law prevails, without legislation under the King's "charter of justice", and invokes the doctrine that custom makes law. The principle, *communis error facit jus,* ought, he thinks, to prevail in such a case as that of California in 1849. And he closes his argument with what, indeed, would seem to be a "poser" to the defendant, by asserting that nothing could better show the injustice of the rule of international law when applied to conditions in California than the fact "that this court has been unable to procure a copy of the law on which this contract is sought to be avoided."[19]

Though a rehearing was had, and, in a second opinion delivered by Justice Heydenfeldt,[20] the theories of Justice Murray were wholly repudiated, the opinion on the first hearing so well illustrates what was undoubtedly the prevailing popular sentiment and gives withal so excellent a description of the legal situation, that we take the liberty of quoting from it at some length. The taste for mixed metaphor which the learned justice displays in the latter part of the quotation reminds one rather too forcibly of the famous Sir Boyle Roche's, "Sir, I smell a mouse, I see him brewing in the air, but I will nip him in the bud." But the fault of style was one of the times, a passion for overstatement marked the era. Says Justice Murray:[21]

> "California, at the time of its acquisition by the United States, contained but a sparse population. It had long been looked upon as one of the outposts of civilization. Its commercial, agricultural and mineral resources undeveloped, it was considered of little importance by the Mexican Government. The body of Mexican laws had been extended over it, but there was nothing upon which they could act, and they soon fell into disuse. The system of government was a patriarchal one, and administered without much regard to the forms of law, which were scarcely alike in any two districts. Such was the state of the country when the discovery of our mineral wealth roused the whole civilized world to its importance. In a few months the emigration from older States exceeded five times the original population of the country. A State government was immediately formed to meet

[19] Id. 49-50.
[20] (1852) 2 Cal. 568.
[21] (1852) 2 Cal. 47-48.

Digitized by Google

> the wants of this unexpected population. The whole world was amazed by our sudden progress; and even the Federal Government, startled from her usual caution by so novel a spectacle, beheld us take our place as a sovereign State before her astonishment had subsided. Emigration brought with it business, litigation, and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark, and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language, and justice was administered by American judges, without regard to Mexican law. Custom was for all purposes law. No law concerning usury was recognized, or supposed to exist. Under this peculiar system this country acquired its present wealth and prosperity. But it would have been much better for the permanent interests of this country that its progress had been less rapid, if, after escaping from the tutelage of a territorial government, we are to be fettered by the dead carcass of law which expired at its birth, for want of human transactions on which to subsist, the application of which would overturn almost every contract entered into before the act abolishing all laws, etc.;[22] would unhinge business and entirely destroy confidence in the country."

As a final specimen of the expression of an official view denying the applicability of Mexican law to Americans, in his preface to the first volume of California Reports, Nathaniel Bennett, not only one of the first Justices of the Supreme Court, but the editor of the first volume of its reports, says:[23]

> "Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region,—in Southern California, perhaps to a less extent. Commercial transactions to an immense amount had been entered into, and large transactions in real estate had taken place between Americans, with reference to the Common Law as modified and admin-

---

[22] Thus in the report. The clause as extended should read "abolishing all laws in force in the State except those passed by the first session of the legislature." The reference is to the Statute of April 22, 1850, found in Statutes, 1850, p. 342.

[23] (1852) 1 Cal., Preface, vi-vii.

Digitized by Google

istered in the United States, and without regard to the unknown laws of the republic of Mexico, and the equally unknown customs and traditions of the Californians; and the application of the strict letter of Mexican law in all cases, would have invalidated contracts of incalculable amount, which had been entered into without any of the parties having had the means of knowing that such laws ever existed."

III

The debate in the constitutional convention of 1849, upon the adoption of the clause in the proposed constitution defining the wife's separate property, brought to the front the champions both of the common law and of the civil law. The committee[24] reported the section as it was finally adopted, as follows:[25]

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The provision thus recommended and finally adopted occurs verbatim in the Constitution of the State of Texas of 1845.[26]

Mr. Lippitt, representing San Francisco, submitted as a substitute the following:[27]

"Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, devise or bequest, or otherwise than from her husband."

He presented his substitute, with the brief statement that he objected to the section as proposed by the committee upon the

---

[24] Browne, Debates in the Convention of California, 257-269.

[25] Id. 257. Constitution of California, 1849, Art. XI, § 14.

[26] 6 Thorpe's American Charters, Constitutions and Organic Laws, 3561; Constitution of Texas, 1845, Article VII, § 19. The statement is made by Hunt, Genesis of California's First Constitution, 45, and reiterated by Goodwin, The Establishment of State Government in California, 218, that the provision in the California Constitution "is believed to be the first instance on record when 'a section recognizing the wife's separate property was embodied in the fundamental law of any state'." Michigan adopted a provision guaranteeing the wife's separate property in 1850. Constitution of Michigan, 1850, Art. XVI, § 5; 4 Thorpe, 1966. Texas is entitled to the honor of being the first state to protect the separate property of a married woman by constitutional guaranty.

[27] Browne, Debates, 257.

Digitized by Google

ground that it changed "the present system". His substitute, he points out, left it to the legislature to act, while the proposed section, he thought, altered the existing law,—a matter with which the constitutional convention should not interfere. Mr. Tefft, afterward appointed by the first legislature judge of the Second District Court, on behalf of his constituents, native Californians of the district of San Luis Obispo, urged that in justice to them, the section as reported by the committee should be adopted.[28] He seems to have been the only member who urged the rights of the native citizens. Mr. Halleck, from Monterey, later a general in the United States army, during the civil war, indulged in a little persiflage.[29] As a bachelor who thought he might some time marry, he suggested that the section as proposed was likely to bring women of fortune to California.

Mr. Botts, of Monterey, an ardent advocate of the common law, though ill, was so moved by the proposed section that he felt compelled to take up the debate.[30] He expressed disappointment that Mr. Lippitt had not attacked the principle of the proposed section, for he had understood before the meeting that that gentleman had proposed to fight the section tooth and nail. Mr. Botts apparently thought Mr. Lippitt's substitute too mild; he would have neither the constitutional convention nor the legislature alter the common law. He took exception to Mr. Halleck's facetious remarks. His argument consisted of a tirade against women's rights, and a laudation of the common law, especially for its treatment of married women. He referred to the "poetical position" in which that law had placed woman.

Mr. Lippitt evidently regarded Mr. Botts' words as a challenge for him to come forward in support of the common law, and he too entered into a discussion of reasons why the common law should prevail in the new Territory.[31] He said:

> "I must confess that, for one, I am wedded to the common law. I am wedded to it as a member of this convention, as representing a portion of the people, and as a citizen of California; and if I were in the legislature, I should be, as a member of the legislature, and for this reason—that the common law and no other law is the law under which

[28] Id. 258-9.
[29] Id. 259.
[30] Id. 259-60.
[31] Id. 260-262.

Digitized by Google

> nine-tenths of the people now in California were born and educated; it is the only law which is known, the only law which her lawyers and judges know, and which we have access to . . . . It is very certain we have all got to come under one uniform code of laws. The general rights of property must be considered with reference to the great mass of the population, the Americans; the smaller party, the Californians, must yield. *But the right of property in reference to man and wife and a thousand other matters are totally different at present. The Americans have been living under the common law: the Californians have been living under the civil.* It is useless to disguise the fact that in course of a few months, the question has to be settled under what code of laws the people are to live. The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority."

The speaker, after reiterating the well worn argument that you cannot have two heads in the family, referred to his experience in Paris, where he blamed the civil law system for the unfortunate situation that two thirds of the married people were living separate from each other. If the proposed section should be adopted, Mr. Lippitt said a husband might be ruined by his wife's debts. He feared the consequences that might result from the failure of the legislature to follow the recommendation of the section with respect to passing a law providing for the registration of the wife's separate property, in which event creditors of the husband would be at the mercy of a fraudulent debtor, who might transfer his property secretly to his wife.

A few very sensible remarks were made by Mr. Dimmick,[82] of San Jose, the first "Chief Justice" of California, appointed by Governor Riley, who pointed out that the proposed section did not change the law but merely stated what was existing law. Three years of residence in the Territory had convinced him of the justice of the system of property rights between husband and wife existing under the native laws and customs.

Mr. Jones, from the San Joaquin district, was the champion of the civil law and the determined foe of the common law in this debate.[83] He had come to California from Louisiana, al-

---

[82] Id. 262-3.
[83] Id. 263-5.

Digitized by Google

though a native of Kentucky, so that he had lived under both systems.[34] Like Mr. Botts, he took the discussion outside of the question of the adoption of the particular section. If the common law was to be adopted, he was ready to meet the issue, he said, or, to quote his own language, "I will meet the gentleman at Philippi." He attacked the common law with the same vehemence as Mr. Botts had praised it. He defied its supporters to tell where it could be found, or to produce anyone who understood it. For his part, he wanted the law so plain "that every man in the Territory could go into a court of justice and defend himself, and he has just as much right to do that as to defend himself in a street fight." Rather inconsistently with his former statement that nobody knew or could know the common law, Mr. Jones said that if that system were "visited upon the country," he could "stand it", for, he said, "I have practiced under it and can comprehend it, but do not, I entreat you, make woman the subject of its despotic provisions!"

Mr. Norton pointed out that both Mr. Botts and Mr. Jones were wide of the mark in their discussions.[35] The question was not, he said, whether the common law or the civil law was to be adopted, but merely as to the rights of a married woman in her separate property. If the civil law should be adopted by the legislature, it would, of course, be unnecessary to have the proposed section in the constitution, but if the common law, then he thought the section was imperative. For though he believed that the common law system should in most respects be adopted in California, he recognized that the treatment of the married woman with respect to her separate property by that system of law was unjust and unsuited to modern conditions.

Mr. Botts closed the debate with another eulogium on the common law, reading a quotation from Blackstone. To that law, he said, we owe the principles of liberty, including the writ of habeas corpus.[36] Mr. Jones here interrupted with the somewhat cryptic utterance, "The writ of habeas corpus is contained in the first Justinian." Mr. Jones' superior learning seemed somewhat to have disturbed Mr. Botts, for he did not reply to

---

[34] Royce, California, 262; see Table of Members in Browne's Debates, p. 479.
[35] Browne, Debates, 265-7.
[36] Id. 267-9.

Digitized by Google

the interruption.[87] Posterity would have been interested to know the precise citation of Mr. Jones' authority for the novel, apparently original, proposition advanced by him. But it sufficed to turn the current of Mr. Botts' eloquence. In closing, Mr. Botts reiterated Mr. Lippitt's arguments about the possibility of collusion between husband and wife to the detriment of creditors, but rather weakened his case on this point, by his gallant exordium, "Thank God, you cannot by any of your laws crush that Spirit of integrity which abides in the breast of woman!"

The section was adopted as originally proposed by the committee.[88]

One or two observations will occur to the reader of the debate upon this question. First, the fact that several of the speakers regard the clause of the constitution as a change in the existing law. To their minds the common law is the law of the Territory. Secondly, there is, during the rather extensive debate, absolutely no word spoken regarding the common property although the section implies the existence of the community system in the phrase, "and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that *held in common* with her husband." It is doubtful whether most of the speakers had any clear conception of the existing system. It is abundantly plain that those who took the main part in the debate, Messrs. Lippitt, Botts and Jones considered that the section was revolutionary with reference to existing law. Lastly, though the clause was taken literatim et verbatim from the constitution of the State of Texas of 1845, nobody mentioned that fact.

IV.

The debates on the clause of the constitution of 1849 guaranteeing the separate property of the wife brought forward as we see at least one champion of the civil law. It had other friends. Governor Burnett in his message to the first legislature which assembled at San Jose in the winter of 1849-50 recommended that both the Civil Code and the Code of Practice of Louisiana be adopted by the legislature, while the common law should be left to control the matters of crimes, evidence and commercial

[87] Id. 268.
[88] Id. 269.

Digitized by Google

law.[39] The Governor stated that he had given much attention to the matter, and thought the Civil Code and Code of Practice of Louisiana peculiarly adapted to conditions in California. Lawyers and judges would, in any event, be obliged to familiarize themselves with the civil law, and apparently the Governor thought they might save the time and trouble of studying two systems by using the codifications made by Livingston. He suggested that copies of the codes could easily be procured from New Orleans.

The Governor's recommendation seems to have called forth the protests of most of the lawyers of San Francisco.[40] A petition was presented to the Assembly, signed by eighty lawyers of that city, out of a bar consisting, it is said, of about one hundred members. The petitioners prayed that the common law be adopted, as modified by the American States, and that the simplest forms of practice and pleading compatible with the common law system be also adopted by the legislature.[41]

The bar was, however, not unanimous. Eighteen lawyers, headed by John W. Dwinelle, the learned author of the Colonial History of San Francisco, a work based upon his argument as counsel in the Pueblo case of San Francisco, and a man whose name is inseparably interwoven with the foundation and early history of the University of California, filed in the Senate a petition praying that the civil law, in its substantial elements, be retained.[42] The petition was referred to the judiciary committee of the Senate consisting of Messrs. Crosby, Bennett and Vermule.[43] To the same committee had been referred a part of Governor Burnett's message which recommended the necessity of passing laws providing for the registration of the separate property of the wife.[44]

The result of Mr. Dwinelle's petition was the elaborate report of the judiciary committee filed on February 27, 1850,

---

[39] Journals, Legislature of California, 1850, 33-34, 598-599.

[40] See the Report on the Adoption of the Common or Civil Law, Journals, 1850, 459. The report is also printed as an appendix to vol. 1 of the California Reports.

[41] Journals, 1850, 735-6.

[42] Id. 126. Besides Dwinelle, Horace Hawes, another distinguished San Francisco lawyer and Prefect of San Francisco, favored the civil law. Bates, Bench and Bar of California, p. 48.

[43] Id. 28, 126.

[44] Id. 65.

Digitized by Google

to which reference has already been made.[45] Mr. Crosby says, in the manuscript entitled "Events in California" in the Bancroft collection:[46]

> "As chairman of the judiciary committee, it devolved upon me to originate and examine almost the entire code of laws of the State. I never did work so hard as during the winter of 1849-50. Among other things there came up the question of the adoption of the common or civil law as the rule governing the decisions of the courts in the absence of statutes. There was quite an element of civil law in the legislature and many wanted that adopted as a rule, the old Roman law, the civil law coming down under the Latin races in contradistinction to the English law. Of course, being from the common law states, I thought it was vastly important that we should adopt the common law. The petitions on that subject were referred to the judiciary committee, and I made a report on the matter, the subject of common and civil law. I prepared the basis of this report, and was assisted in its filling up by Bennett, afterwards one of the judges of the Supreme Court.[47] That is one of the things I take some pride in. I was very much complimented on the work at that time, and my law friends in New York, to whom I sent a copy were so pleased with it that they sent me out a little testimonial, a handsome seal with my family crest engraved upon it."[48]

The bill making the common law of England the basis of the jurisprudence of the State did not pass without some difficulties upon the floor of the Assembly. On its final reading, a substitute was proposed by Edmund Randolph of San Francisco, a member of the judiciary committee, in effect embodying the Governor's recommendation that the civil law be the basis of the jurisprudence of the new State.[49] He moved as a sub-

---

[45] Id. 459-480.

[46] Crosby, Events in California, 132. Although the credit for procuring the adoption of the simplified system of procedure is usually given to Judge Field, it would seem that Mr. Crosby was better entitled to the claim. Field was not a member of the first legislature.

[47] Shuck, Bench and Bar of California, 262, says that the adoption of the common law is owing to Judge Bennett more than to any other one person.

[48] A mischievous compositor or proof-reader evidently did not have so high an opinion of Mr. Crosby's work. At page 460 of the Journals, Mr. Crosby cited a little Latin which may be found in Blackstone. He referred to the industry of lawyers and spoke of the "viginti annorum lucubrationes." It appears in the printed report, "viginti asinarum lucubrationes."

[49] Journals, Legislature of California, 1850, 1123.

Digitized by Google

stitute that "the English law of evidence and the English commercial law as understood in the courts of the United States" be the rule of decision in cases not provided for by statute. The substitute was lost by a vote of 16 to 10, and the original bill was passed.[50] It became a law April 12, 1850.[51] Mr. Randolph, though a native of Virginia and educated in that State had, like Jones, the friend of the civil law in the Convention, practiced for a number of years in Louisiana, where he had also been for a time clerk of the United States District Court.[52] The chairman of the Assembly Committee which had the duty of presenting the bill and securing its passage in that body was A. P. Crittenden of Los Angeles. The bill was introduced in the Assembly by Mr. Brackett, of Sonoma.[53] In the Senate the bill was in charge of the judiciary committee of which Mr. Crosby was the chairman.[54]

V.

We have seen that Governor Burnett's message had also recommended that measures be taken in accordance with the constitutional recommendation providing for the registration of the separate property of the wife, and that this portion of the message had been referred to the judiciary committee of the Senate. A bill was introduced in the Assembly covering not only this matter but also the whole subject of community and separate property of the spouses, by Mr. A. P. Crittenden, chairman of the Assembly judiciary committee.[55] It was afterwards amended in certain respects, not designated in the journal in the committee of the whole.[56] The 12th section of the act, providing for division of the community property upon divorce, met with some opposition. Mr. Wheeler moved to strike it out, but the motion was lost by a vote of 12 to 7.[57] Later on April 10, 1850, Mr. Brackett moved to refer the bill to a

---

[50] Id. 1124.
[51] Statutes, 1850, 219. Mr. Goodwin states that the bill was signed by the Governor on April 13. Goodwin, The Establishment of State Government in California, 286.
[52] Shuck, Bench and Bar of California, 261.
[53] Journals, Legislature of California, 1850, 1111.
[54] Id. 28, 324.
[55] Id. 1053.
[56] Id. 1162.
[57] Id. 1166.

Digitized by Google

select committee with instructions to strike out the same section, and the motion was carried.[58] But a reconsideration was had and the bill passed in its final form by a vote of 17 to 4.[59] It was reported in the Senate as passed by the Assembly on April 12,[60] and on April 13, was passed by the Senate under a suspension of the rules.[61] It was signed by the Governor on April 17.[62]

The measure which thus became a law, like the previous constitutional provisions upon the same subject, was plainly modelled upon the experience of Texas.[63] True, the act of April 17, 1850, does not slavishly follow the language of the Texas act of January 20, 1840, but the similarity of the two pieces of legislation leads inevitably to the conclusion that the draftsman of the California act had before him the Texas statute.

The Texas law in substance was as follows: Section 1 adopted the common law. Section 2 repealed all laws in force prior to 1840, with a few exceptions. Section 3 provided that neither the lands nor slaves which the widow may own or claim or which she may acquire during coverture by gift, devise or descent, nor the increase of such slaves, nor the paraphernalia of the wife as defined at common law shall become the property of the husband, but shall remain the property of the wife, provided that during the marriage, the husband shall have the sole management of such lands and slaves. It will be noted that the above definition of separate property was extended by the Texas Constitution of 1845, so as to include personalty.[64] It will also be noted that, as in the Mexican system, the increase of her separate property (other than slaves) does not constitute the separate property of the wife.[65]

Section 4 of the Texas statute defines the common property.

---

[58] Id. 1166-7.
[59] Id. 1167.
[60] Id. 324.
[61] Id. 326.
[62] Statutes, 1850, 254.
[63] Laws of the Republic of Texas, An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws and to Regulate the Marital Rights of Parties. 2 Gammell, Laws of Texas. 177-180.
[64] See, ante, note 26.
[65] 1 Cal. Law Rev., 40.

Digitized by Google

All property, except lands and slaves, which either husband or wife shall bring into the marriage or shall afterwards acquire, other than by gift, devise, or descent, is common property, and during marriage shall be sold or disposed of only by the husband. It shall be first liable for the husband's debts and for debts contracted by the wife for necessaries. Upon the dissolution of the marriage by death, after the payment of such debts, the remainder of the common property shall go to the survivor, if the deceased have no descendant or descendants; if there be a descendant or descendants, the survivor shall have one-half of the common property, the other half shall pass to such descendant or descendants. The third and fourth sections of the Texas act are practically identical with the first, second and ninth sections of the California act.

Section 5 of the Texas statute provides, in almost the language of sections 22 and 23 of the California statute, that the parties may enter into a marriage contract, but cannot alter the legal order of descent as to their children, nor must they by such contract impair the legal rights of the husband over the person of the wife or the children of the marriage. Section 6 provides that marriage agreements, changing the rights of the spouses, must be executed before a notary, and provides how a minor may enter into such contract. The sections are practically identical with sections 16 and 20 of the California act. Section 7 of the Texas act, like section 21 of the California statute, provides that the marriage agreement cannot be altered after marriage. Section 8 in the Texas act and section 17 of the California act require such contracts to be recorded.

The Texas law provided that the husband should be required, by order of court, if he neglected to support the wife or to educate the children, to pay over to the wife out of her property, sufficient for those purposes (sec. 10). The California statute (sec. 8) provided that in case of mismanagement of the separate property by the husband, the wife might have a trustee appointed to manage it.

Express provision is made in the Texas act that all property possessed during marriage is presumed to be common until the contrary is proved (sec. 12). The California act omits this provision, but the presumption necessarily follows

Digitized by Google

from a reasonable construction of the statute, and has always been recognized by the courts.

The most peculiar sections in both statutes are those dealing with the application of the statute. Under section 13 of the Texas act, it applies (1) to all persons who enter into marriage in Texas after the passage of the act; (2) to all married persons, who, though married elsewhere, remove to Texas and acquire property there after the passage of the act. It does not apply to the rights of persons (1) married in Texas before the passage of the act or (2) married elsewhere but having moved to Texas before that date. The marital rights of such persons are to be governed by the pre-existing law.

The California statute (sections 14 and 15) is equally detailed on the subject of its application. Though the language is in many respects similar to that of the Texas law, there are some important differences. The California statute applies (1) to all parties to marriages thenceforth contracted; (2) to all persons married in the State prior to April 17, with respect to property subsequently acquired; (3) to persons married out of the State who shall reside therein and acquire property, with respect to such property.

Questions of legal interpretation arising under this and other sections of the Act of 1850 will be discussed in a later article. It is here sought only to compare the two acts for the purpose of showing the origin of the California statute and its connection with the law of Texas. The California act is the more neatly arranged and expressed, and contains in addition to the provision for the filing of the inventory of the wife's separate property, provisions for the mode of conveyance, both of which matters were provided for by other statutes in Texas.

In both States, the community property system was the only part of the older law that survived the shock of contact with the American common law. Why this happened, we can only guess. The fact that the few married people in both communities had entered into marriage under the former system and the inherent fairness of its fundamental idea of a marital partnership doubtless contributed to preserve the Mexican law upon this subject, in both jurisdictions.

Questions of some difficulty might have arisen in California

Digitized by Google

from the fact that the act adopting the common law and that adopting the common property system were passed on different days, and not, as in Texas, by the same act or on the same day. The case of a man or woman marrying in California between April 12 and April 17, or of a married man or woman dying between those dates might have given rise to some interesting questions. As the common law was in force for these five days, would not a man who married a woman between those days be entitled to curtesy in her lands? And would not a woman whose husband died between those days be entitled to dower in his separate lands?

Orrin K. McMurray.

Berkeley, California.

Digitized by Google

Trust Deeds and Mortgages in California

I.

THE origin of collateral security has been found by historians in the "forfeit." Where there is little exchange of goods, and that little by barter, no law of contracts and no law of collateral security exists, for none is needed. The development of credit creates the demand for security. Most countries seem to have solved the problem at first by substituting the security for the obligation. The debtor gave the creditor something of value as security. If the debtor satisfied the obligation in accordance with its terms he got back his property, otherwise not. So completely, however, was the security substituted for the original obligation that if the security were destroyed or became depreciated, the loss fell on the creditor. Again, the creditor's title was not absolute, and, therefore, even after default, while he could keep the security indefinitely, he could not, as a rule, dispose of it. As might have been expected, in time the creditors worked out an arrangement more satisfactory to themselves by preserving a right to proceed against the borrower if the security became inadequate, or even to proceed personally against the debtor without regard to the security. The difficulty presented by the lack of title in the creditor was solved by taking an absolute conveyance from the debtor in the first place. This arrangement, so highly satisfactory from the creditor's point of view, was disturbed by custom or positive law in the interest of the debtor class to prevent a forfeiture where the value of the security greatly exceeded the debt.[1] Various methods for relieving the forfeiture or mitigating its rigors have existed. The modern method of most of the continental codes positively prohibits any transfer of absolute title by way of security. The lender can get nothing more than a security right in the goods, a *jus in rem,* as it is termed by the Code

[1] Prof. Wigmore, The Pledge Idea, 10 Harv. Law Rev. 321, 389, 11 id. 18; Brissaud, History of French Private Law, 582-620.

Digitized by Google

Napoleon.[2] This gives the creditor a right to have a sale on default, usually under judicial process, accounting to the debtor for the surplus, if any, with a personal judgment against the debtor for any deficiency. By no device in the original transaction can the creditor get the right to retain the security without a sale.

In England, these results were accomplished in part through the intervention of the court of equity. Forfeiture in England is not so much prevented as relieved against. At law a mortgage has been defined as

> "an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is, therefore, an estate defeasible by the performance of a condition subsequent."[3]

The court of equity interposed by allowing the mortgagor to redeem even after default, that is, after condition broken. The mortgagee could foreclose this equity of redemption by going into court and getting a decree that unless the mortgagor paid up within a certain time he should lose the right to redeem.

The court of equity also has and exercises the power of ordering a sale of the property where justice requires it.[4] The sale being the remedy that best accords with the real nature of collateral security it occurred to the creditor to provide for the sale in the original instrument and thus to avoid the necessity of judicial proceedings. The same result was accomplished by a trust deed, the trustees being empowered to sell on default. Indeed, for a time, it was doubted whether a sale under a mortgage was entirely fair, and it was suggested that the intervention of a trustee who would represent both parties was necessary to make a sale valid. These doubts were resolved, however, in favor of the validity of the power of sale in a mortgage.[5] For many years such a power has been given in England by statute. So satisfactory is the statutory power

---

[2] § 2114.
[3] Washburn, Real Property, 6th ed., § 975.
[4] Halsbury, Laws of England, vol. 21, p. 274.
[5] Jones, Mortgages, 5th ed., § 1765.

Digitized by Google

that only in special cases is such power expressly given in the mortgage.[6]

In the United States the English system prevails in many jurisdictions, while in others the mortgage is treated as a mere security or lien for the performance of an act. Both systems work out the same general result. Under the English theory, title passes to the mortgagee at law with an equity of redemption enforced in equity. Under the lien theory, no title passes to the mortgagee, any agreement to the contrary notwithstanding. The latter view is, it will be observed, an attempt to state the substance of what the court of equity has accomplished. It is simple, logical and in accordance with the facts. The substantial rights of the parties are about the same under either theory. For as Lord Redesdale said, "A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will undoubtedly be ranked under the strict law of the next."[7] The lien theory states the result; the title theory perpetuates the historical, accidental and arbitrary method by which the rule was achieved. The lien theory is a road constructed scientifically, after careful surveys; the title theory preserves the circuitous route traversed by the original explorers. It constitutes one of the confusing features of our law due to the perpetuation of the dual system of law and equity.

II.

It is not, however, the purpose of this article to discuss the theory of mortgages, but the differences between a mortgage and a trust deed in California. It must be apparent that whether the title theory or the lien theory be adopted a trust deed and a mortgage will be treated in much the same way. A court of equity, which requires a grantee of the legal title by a deed intended as security for an obligation to deal with it as a security title only, will look precisely in the same way upon a conveyance to trustees for the same purpose. Likewise, a court which holds that no legal title passes to the mortgagee will generally hold that no title passes when the conveyance is made to trustees.[8] Statements are innumerable that there is no real difference between a trust deed and a mortgage, and

[6] Maitland, Equity, 279.
[7] Mitford, Equity, 429, quoted in 10 Mich. Law Rev. 597.
[8] Jones, Mortgages, 5th ed., § 62.

Digitized by Google

this is true,[9] in general, although points of difference do arise. The trustee is said to hold a fiduciary relation, whereas the mortgagee does not. The trustee must, therefore, be personally present at a sale of the property, and he cannot assign his trust in the absence of an enabling provision in the trust deed.[10] But these distinctions are unsound. The trustee under a trust deed is in no real sense a fiduciary. He is usually an agent of the lender of the money and in a rational system could well be dispensed with. The attempt to fasten the strict fiduciary duties of the trustee of an express trust upon the trustee of a security deed is bound to run counter to the expectations of the parties. The trustee of a trust deed for security is in reality no more of a fiduciary than the law compels a mortgagee to be.

While in most jurisdictions there is little difference between a trust deed and a mortgage the courts of California, strangely enough where the lien theory of mortgage has been adopted, have preserved trust deeds in which the legal title actually passes. Both the lien theory and the legal title theory have been made to work fairly well. When, however, the two theories are simultaneously in operation in the same jurisdiction, difficulties are sure to arise. Where there is one and the same object to be accomplished there should be but one method of accomplishing it. Important collateral differences should not be made to depend upon the more or less accidental choice of one security rather than the other.

What are some of the differences between mortgages and trust deeds in California? The lien theory as to mortgages was covered by the Practice Act of 1851, later embodied in the Code of Civil Procedure.[11] Deeds of trust in which the legal title passed to the trustee were, however, sanctioned in Koch v. Briggs.[12] This was an action of ejectment by the purchaser under a trustee's sale. The sale in question had no greater effect than a power of sale exercised by a mortgagee under a power in the mortgage with permission in the mortgagee to buy. Yet the court said, in regard to a trust deed,

---

[9] Shillaber v. Robinson (1877), 97 U. S. 68, 24 L. Ed. 967.
[10] Jones, Mortgages, 5th ed., § 1862.
[11] Cal. Code Civ. Proc., § 744.
[12] (1859), 14 Cal. 256.

Digitized by Google

"It has no feature in common with a mortgage, except that it was executed to secure an indebtedness. This will be evident from a consideration of the rights of parties to a mortgage with reference to the mortgaged property. Where there is a mortgage there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor. It matters not whether we consider the instrument a conveyance of a conditional estate in the land, as at common law, or as creating a mere lien or incumbrance for the purpose of security, as by our law. The right to foreclose,—whether resulting in vesting an absolute title to the property in the mortgagee, as formerly in England, or in a judicial sale of the premises, as in this State,—exists in all cases of mortgage, after breach of condition, as does also the right to redeem the property from forfeiture, or from the incumbrance of the lien. These two rights are mutual and reciprocal. When the one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage."

To this it may be said that security for an indebtedness is the important and essential thing in the whole transaction. A paramount public policy will not permit the mortgagee in a mortgage to get the legal title, no matter how emphatically the parties may have expressed that intention. It is not a matter on which the parties are competent to contract. Precisely the same reasoning applies to trust deeds, but by putting the transaction in the artificial form of a conveyance of the legal title it becomes necessary to determine in each case as the question arises whether the form of the transaction or the substance is to be given effect.[18]

It is too late to question trust deeds in California. Their validity has been reaffirmed in numerous cases. Even the

[18] Grant v. Burr (1880), 54 Cal. 298; Bateman v. Burr (1881), 57 Cal. 480; Savings and Loan Soc. v. Deering (1885), 66 Cal. 281, 5 Pac. 353; Sacramento Bank v. Alcorn (1898), 121 Cal. 379, 53 Pac. 813. (For the purpose of the revenue system a trust deed has always been regarded as an encumbrance.) Copsey v. Sacramento Bank (1901), 133 Cal. 659, 66 Pac. 7; Sacramento Bank v. Copsey (1901), 133 Cal. 663, 66 Pac. 8, 205. (An action may be maintained for a deficiency after sale. In a mortgage foreclosure the amount of the deficiency may be docketed as a judgment on the return of sale.) Tyler v. Currier (1905), 147 Cal. 31, 81 Pac. 319; United States Oil and Land Co. v. Bell (1915), 219 Fed. 785. It is curious that the opinion in Koch v. Briggs should have been written by Mr. Justice Field. It was Mr. Justice Field who upheld the view that in a mortgage the legal title

Digitized by Google

adoption of the code produced no effect,[14] and the code itself was amended.[15] Since then attacks have been made on trust deeds as trusts for an unauthorized purpose and restraints on alienation. But the court has held them too strongly entrenched as a rule of property[16] to be interfered with. As was said in Kinard v. Kaelin,[17]

---

remained in the mortgagor even at law. In McMillan v. Richards (1858), 9 Cal. 365, 70 Am. Dec. 655, there is an intimation that title in a mortgage may pass for some purposes, but there is no such suggestion in Nagle v. Macy (1858), 9 Cal. 426, and in Dutton v. Warschauer (1863), 21 Cal. 609, 82 Am. Dec. 765, Mr. Justice Field was willing to go the whole length by holding that no title passed to the mortgagee even in a mortgage executed before the Practice Act, a view to which his colleagues withheld assent, but a view which was later adopted in part at least. Grattan v. Wiggins (1863), 23 Cal. 16; Skinner v. Buck (1865), 29 Cal. 253. The trenchant criticism by Mr. Justice Field of any compromise between the title theory and the lien theory is entirely applicable to trust deeds. "Here the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common law views of the subject, and a hesitation by the courts to carry either view to its logical consequences." Goodenow v Ewer (1860), 16 Cal. 461, 467. Yet this same judge perpetuated the inconsistent intermediate ground by upholding trust deeds. In Idaho, a state which adopted all the pertinent sections of the California Civil Code except §§ 2931, 2932, and adopted the code after its provisions had been interpreted in California as sanctioning trust deeds, nevertheless held trust deeds to be mortgages. Brown v. Bryan (1896), 6 Idaho 1, 51 Pac 995.

That a deed absolute intended as a mortgage does not pass the title was early held in California. These decisions were later departed from. The code re-established the earlier rule but the intermediate decisions arose to plague the court for many years. Allen v. Allen (1892), 95 Cal. 184, 27 Pac. 30.

[14] "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." Cal. Civ. Code, § 2872; "Every transfer of an interest in property, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge." Cal. Civ. Code, § 2924.

[15] The foregoing sections of the code were amended in 1877 by the insertion of the words "other than in trust," and these words were construed to include trust deeds by way of security. Banta v. Wise (1901), 135 Cal. 277, 67 Pac. 129.

[16] In Gray, The Rule Against Perpetuities, 2nd ed., § 570, it is said that trust deeds and mortgages in which the legal title passes should be frankly declared to be an exception to the rule against perpetuities and the California cases on restraints against alienation are cited with approval. Sacramento Bank v. Alcorn (1898), 121 Cal. 379, 53 Pac. 813; Camp v. Land (1898), 122 Cal. 167, 54 Pac. 839; Staacke v. Bell (1899), 125 Cal. 309, 57 Pac. 1012; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (1897), 86 Fed. 975.

[17] (1913), 22 Cal. App. 383, 134 Pac. 370.

Digitized by Google

"Finally an attack is made upon the legality of deeds of trust. In this behalf it is urged that the power of sale usually granted in such instruments, and appearing in the deed of trust in controversy here, is voidable and legally nonavailable unless preceded by proceedings to foreclose as in the case of an out and out mortgage. In short, it is the plaintiff's contention that the deed of trust in question must, as a matter of law, be construed and considered as a mortgage with all of the rights, incidents, and obligations thereof. Practically this same point was presented fourteen years ago in the case of Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, and there finally and definitely decided adversely to the contention made by the plaintiffs here. The decision in that case has never been overruled, modified, or criticised. On the contrary it has since been continually adhered to, and it stands today as the settled law of this jurisdiction."

One of the differences between trust deeds and mortgages in California, to which most attention has been directed is the statutory right of redemption, often mistakenly called an equity of redemption. In a trust deed in California the grantor still retains an equity of redemption. He can pay up the indebtedness at any time before his equity has been cut off by a sale of the property, and can thus regain the legal title. To the mortgage in California, however, besides this equity of redemption there is attached the statutory right to redeem at any time within a year after the foreclosure sale.[18] The Practice Act of 1851 provided for redemption from execution sales and the early case of Kent v. Laffan,[19] without much discussion, held that these provisions also applied to sales under mortgage foreclosures. In McMillan v. Richards,[20] the court indicated that as an original question this decision was open to question, but the rule as established in Kent v. Laffan had become a rule of property not subject to change. It is conceded that no such statutory right exists after a sale under a trust deed.[21] But

[18] Where this right of redemption exists after sale, the mortgagor retains possession; this affords some temporary security to chattel mortgagees who may otherwise be cut out very abruptly. Penryn Co. v. Sherman-Worrell Co. (1904), 142 Cal. 643, 76 Pac. 484; Elliott v. Hudson (1912), 18 Cal. App. 642, 124 Pac. 103.

[19] (1852), 2 Cal. 595.

[20] (1858), 9 Cal. 365. It is general law that statutes providing for redemption from execution sales apply to foreclosure sales. 27 Cyc. 1800.

[21] Sacramento Bank v. Alcorn (1898), 121 Cal. 379, 53 Pac. 813; Penryn Co. v. Sherman-Worrell Co. (1904), 142 Cal. 643, 76 Pac. 484.

Digitized by Google

suppose there is a sale under a power in a mortgage.[22] Does the statutory right of redemption exist? The question is raised in Cormerais v. Genella,[23] where the court in sustaining the right to foreclose a mortgage remarked that if the mortgagee chose the cumulative remedy of a sale under a power, a doubt might arise "whether such right of redemption existed." By way of dictum it has been denied that there is any such right. "The continuance of this power in a mortgage is as inconsistent with the general policy of requiring all forced sales to be subject to redemption as are trust deeds."[24] This dictum has not been sufficient to allay the doubt, with the result that the power of sale while generally included in a mortgage is seldom resorted to in California. In the early case of Benham v. Rowe,[25] it was said, "Where a power of sale is contained in a mortgage, and under a sale by virtue of such power, the mortgagee becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor." The mortgage in this case, however, was created prior to the Practice Act of 1851. Clearly, therefore, the provisions for redemption in that act could not be applied to the mortgage in question. So that all the court decided in Benham v. Rowe was that where under a power of sale in a mortgage a purchase is made by the mortgagee, the mortgagor's right of redemption will continue for a reasonable time.

A mortgage, as we have seen, may include a power of sale.[26] The power is cumulative with the right to foreclose which always exists. In a trust deed the trustee's sale is the normal proceeding on default. Can there be a foreclosure under a

---

[22] Practice Act, 1851, § 260, (later Code Civ. Proc. § 744), provided as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." It might have been held that this section required a judicial decree of foreclosure, but it was held in Fogarty v. Sawyer (1861), 17 Cal. 589, that it was competent for a power of sale to be included in a mortgage, and this rule survived the general abolition of powers in California. Cal. Civ. Code, § 858; Estate of Fair (1901), 132 Cal. 523, 557, 60 Pac. 442, 64 Pac. 1000, 80 Am. St. Rep. 70.

[23] (1863), 22 Cal. 116.

[24] Sacramento Bank v. Alcorn (1898), 121 Cal 379, 53 Pac. 813.

[25] (1852), 2 Cal. 387. The weight of authority is to the effect that the statutory right to redeem does not apply to a sale under a power, unless the statute so provides. 27 Cyc. 1803.

[26] Supra, n. 22.

Digitized by Google

deed of trust? It has been held that there can, in cases where the accounts are unsettled, where the trustee refuses to act, or where some other special reason exists.[27] The court, taking jurisdiction on these special grounds, then proceeds to settle the entire controversy by ordering a judicial sale, differing in this particular from the English courts, which in such cases usually order the trustee to sell.[28] In other decisions in California, foreclosure of a trust deed has been permitted without any question being raised as to the propriety of the remedy.[29] But, in Koch v. Briggs,[30] it was said,

> "In reference to the deed in question, no suit for a foreclosure, as in cases of mortgage in England, would lie, for there could be no forfeiture of the estate to enforce, and of course no equity as against such forfeiture to foreclose. Nor would a suit lie for a foreclosure under our system—that is, for a decree adjudging a sale of the premises and the application of the proceeds to the payment of the debt, as such suit could only be based upon the contract of the parties, and the contract here is only that, upon the happening of a certain event, the trustee shall sell. Equity could not adjudge a sale, as in case of a mortgage, without disregarding the express contract of the parties, and making a new and different one."

The language was dictum in the case, for the decision was simply that a sale under the power was effectual. It was not necessary to decide that foreclosure would not lie. The authority is an English case.[31] This case holds that the parties having provided for a sale by trustees the court could not make a contract for them by ordering a judicial sale. Apparently, however, if the trust deed had authorized foreclosure the courts would have enforced it. The English cases would, therefore, permit effect to be given to the provision often inserted in trust deeds in California that the deed, at the option of the holder, may be foreclosed as a mortgage, although some doubt is cast upon the efficacy of this provision by the decis-

---

[27] Curtin v. Krohn (1906), 4 Cal. App. 131, 87 Pac. 243, and cases cited.

[28] Jones, Mortgages, 5th ed., § 1775.

[29] Odd Fellows' Savings & Comm. Bank v. Harrigan (1878), 53 Cal. 229; Levy v. Burkle (1887), 2 Cal. Unrep. Cas. 778, 14 Pac. 564. See, also, Powell v. Patison (1893), 100 Cal. 234, 34 Pac. 676.

[30] (1859), 14 Cal. 256.

[31] Sampson v. Pattison (1842), 1 Hare 533, 66 Eng. Repr. 1143. This case involved a charge on land, rather than a security trust deed.

Digitized by Google

ions that the parties by agreement cannot confer jurisdiction on the courts.[32] In most courts in the United States there is a freer resort to judicial proceedings in trust deeds than in mortgages.[33] Another question that arises, in case the court does sell under a trust deed, is whether the sale is subject to the statutory right of redemption? It has been held that it is.[34]

It is thus evident that there are still many unsettled questions. A mortgage is ordinarily foreclosed: in a deed of trust the trustee sells. A power of sale may be, and usually is, included in a mortgage, but the mortgage does not in practice, as a rule, contain the provisions usual in trust deeds making a recital of notice, default, etc., conclusive in favor of the purchaser;[35] consequently, and on account of the doubt as to whether the statutory period of redemption exists, the power of sale under a mortgage is seldom exercised. In a trust deed, on the other hand, there is considerable doubt as to whether foreclosure will be permitted, and, if permitted, whether there is the statutory right of redemption.

The greatest disadvantage in a trust deed as compared with a mortgage is that, while in a mortgage the mortgagor retains possession during the statutory period for redemption, at the end of that time the sheriff can put the purchaser in possession. In a trust deed, on the other hand, although there is no period of redemption, the purchaser has no process for getting possession. If possession is refused, the purchaser must bring ejectment, and, by a resort to obstructive tactics, the recovery of possession is often delayed for a long time. The right to bring a foreclosure proceeding, in which all disputed points may be adjudicated and the sale be made effective to the purchaser is extremely valuable. The doubt as to the availability of this remedy is one reason why many bankers and lawyers prefer a mortgage to a trust deed.

---

[32] Scott v. Hotchkiss (1896), 115 Cal. 89, 47 Pac. 45.

[33] Jones, Mortgages, 5th ed., § 1773, cited in Curtin v. Krohn, supra, n. 27.

[34] Levy v. Burkle (1887), 2 Cal. Unrep. Cas. 778, 14 Pac. 564; Odd Fellows' Savings & Comm. Bank v. Harrigan (1878), 53 Cal. 229, was a case where the decree had become final.

[35] Such recitals are not necessary to make the sale valid. Savings & Loan Soc. v. Deering (1885), 66 Cal. 281, 5 Pac. 353. But they are greatly relied on. Mersfelder v. Spring (1903), 139 Cal. 593, 73 Pac.

Digitized by Google

There are other practical questions connected with the statutory right to redeem. For reasons considered later it is usual for the mortgagee to purchase at the foreclosure sale. Where the right of redemption exists the mortgagee is compelled to pay the amount of the mortgage and costs, if the property is worth that much, otherwise the mortgagor might sell his right to redeem to a purchaser who by redeeming would take the property from the mortgagee.[86] Where no right of redemption exists there is apparently nothing to prevent the creditor from buying at his own figure, unless the court should follow the English decisions and permit a redemption even after an absolute sale, a proceeding of the English courts which makes a purchase there under a mortgage sale an extremely hazardous proceeding.[87]

Other differences arise from the effect of section 726 of the Code of Civil Procedure, providing for one form of action for the recovery of a debt secured by mortgage, thus prohibiting an action on the note. In a pledge no such prohibition exists. How about a trust deed? In Powell v. Patison,[88] an action on a note secured by a deed of trust, it was held that a "personal judgment on a secured debt before the security has been legally exhausted is erroneous." In Hodgkins v. Wright,[89] it was said by Mr. Justice Temple, "It is not admitted that if the conveyances were expressly trust deeds, given to secure the indebtedness, plaintiff could bring a personal action before she had exhausted the security." These views were elaborately expounded by the same judge in Herbert Kraft Co. v. Bryan in the department opinion.[40] On rehearing, the court in bank set aside the judgment in department on another ground, but proceeded to discuss the nature of trust deeds, as follows:—

> "Respondent contends that this action can be maintained on the promissory note independent of the deed of trust,

---

452; Continental Bldg. Ass'n v. Light (1907), 6 Cal. App. 684, 92 Pac. 1034; Jose Realty Co. v. Pavlicevich (1913), 164 Cal. 613, 130 Pac. 15.

[86] In Weyant v. Murphy (1889), 78 Cal. 278, 20 Pac. 568, 12 Am. St. Rep. 50, the court relieved a party who had bid less than the amount of the judgment, referring to the bid as a "stupid blunder."

[87] Maitland, Equity, 272.

[88] (1893), 100 Cal. 236, 34 Pac. 677.

[89] (1900), 127 Cal. 688, 60 Pac. 431.

[40] The decision in bank is reported (1903), 140 Cal. 73, 73 Pac. 745. The department opinion is reported as Herbert Craft Co. v. Brian (1902), 6 Cal. Unrep. Cas. 923, 68 Pac. 1020.

Digitized by Google

> and whether or not the security under that deed had been exhausted, and that therefore it is immaterial whether there was a valid sale to plaintiff, or any sale at all; but under the views above expressed it is not necessary to here determine this question. It may be said, however, that the question is not concluded by the fact that section 726 of the Code of Civil Procedure merely provides that there shall be only one action for a debt secured by mortgage, and that a trust-deed is not a mortgage. Assuming that a trust-deed is not within that section, still there are other considerations to be weighed in determining whether a creditor who has accepted such a deed as security has not contracted to pursue the terms of the deed when he attempts to forcibly collect the debt. In Savings and Loan Society v. Burnett, 106 Cal. 514, it is said—though perhaps not decided—that the grantor retains the right to a conveyance on payment, 'and to a sale as provided in case of default'; and this right seems to be indicated in other cases. Powell v. Patison, 100 Cal. 236, can hardly be considered authority on the point. When in that case the court said that 'It is well settled by authority in this state that a personal judgment on a secured debt before the security had been legally exhausted, is erroneous,' it must have had in mind security by mortgage, for in all cases cited as authority on the point—Barbieri v. Ramelli, 84 Cal. 154; Crim v. Kessing, 89 Cal. 478; and Biddel v. Brizzolara, 64 Cal. 354—a mortgage only was involved. We have been referred to no other case where it has been directly held that an action cannot be maintained on a secured indebtedness without first exhausting the security, where the security was not a mortgage. On the other hand, it was decided in Ehrlich v. Ewald, 66 Cal. 97, that an action could be maintained on an indebtedness secured by a pledge of personal property without first exhausting the security, and in Samuel v. Allen, 98 Cal. 406, that an independent action could be maintained on an indebtedness although the plaintiff had a vendor's lien as security. We have noticed the subject to this extent because it has been elaborately discussed and because what has been said may possibly be of some aid in examining the question hereafter, if it should ever necessarily arise in some future case."

Just what aid this opinion affords one who wants to know the law is not apparent. The question discussed occasionally arises. It is conceded that a debt secured by mortgage is not a cross demand which may be considered as mutually compensated under section 440 of the Code of Civil Procedure, nor is

Digitized by Google

such a debt available as a counterclaim.[41] In Pitzel v. Maier Brewing Company,[42] the court said that it could not be ascertained from the counterclaim whether the debt was secured by a trust deed or by a mortgage. But the court proceeds as follows:

> "Therefore, in order that facts sufficient to constitute a good cause of counterclaim be set up it should have been made to appear that the contract of security was such as to relieve the creditor from the obligation of exhausting his security before pursuing a personal action. As the Supreme Court has intimated in the case of Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745, even though a contract for security of this nature lacks the essentials of a mortgage, still the engagements of the parties may be such as expressed in the terms of their contract—call it trust deed or what not—as to entitle the debtor to insist that the creditor shall first resort to the security in obtaining satisfaction of the debt."

Apparently the answer to the question depends upon the terms of the particular trust deed. This controversy must seem strange to lawyers outside of California, for if any proposition is well established it is that in all notes secured by mortgage the creditor has a choice of remedies, and may, indeed, in some cases pursue all of them.

> "So soon as the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, subject, as regards the powers of sale and appointing a receiver, to the restrictions imposed by agreement or by statute, according as the powers are express or statutory. Hence the mortgagee can at the same time sue for payment on the covenant to pay principal and interest, for possession of the mortgaged estate, and for foreclosure, and can combine these claims in the same action; and until judgment *nisi* has been obtained in his foreclosure action he can exercise his power of sale".[43]

With some limitations, this rule is general in the United States. On principle, however, there is something to be said for the view that the implied understanding of the parties in mortgages and trust deeds is that the security should first be exhausted. If this be considered as the settled rule in California in regard to trust deeds, as it certainly is in regard to

---

[41] Moore v. Gould (1907), 151 Cal. 723, 91 Pac. 616.

[42] (1912), 20 Cal. App. 737, 130 Pac. 706; see also Crisman v. Lanterman (1906), 149 Cal. 647, 87 Pac. 89.

[43] The Laws of England, vol. 21, p. 244; 27 Cyc. 1515.

Digitized by Google

mortgages, little harm can result, for in the case of mortgages, and *a fortiori* in the case of trust deeds, it is perfectly competent for the parties to insert an express provision that the creditor may have and exercise both remedies.[44]

Closely connected with the foregoing question is that of negotiability. Notes secured by mortgage are clearly non-negotiable, not only by reason of section 726 of the Code of Civil Procedure, but also under sections 3088, 3092 and 3093 of the Civil Code. Under these latter sections a note secured by deed of trust would also be non-negotiable, although it may be possible that by stipulations giving an independent right of action on the note, the latter may be negotiable just as if given in part performance of an executory contract.[45]

In both mortgages and trust deeds possession remains in the debtor in the absence of agreement. He has the right to recover possession by action.[46] He may declare a homestead on the property,[47] and the execution of a trust deed after the declaration of a homestead does not constitute an abandonment thereof under section 1243 of the Civil Code.[48] Like a mortgagor, the grantor under a trust deed may devise and transfer the property.[49] It is subject to attachment and execution by his creditors as real estate. A trust deed does not constitute the trustee the owner so as to require him to give notice of non-responsibility to avoid liens under the mechanics' lien laws.[50] The title of the grantor is not divested so as to take away the estate of inheritance required under the McEnerney Act.[51] Yet while a trust deed is treated much as a mere lien or incumbrance for the purposes of the McEnerney Act, the mechanics' lien laws, etc., it is neither a lien nor

---

[44] Martin v. Becker (1915), 49 Cal. Dec. 142, 146 Pac. 665.

[45] In Smiley v. Watson (1913), 23 Cal. App. 409, 138 Pac. 367, the point was raised by the court.

[46] Tyler v. Granger (1874), 48 Cal. 259.

[47] King v. Gotz (1886), 70 Cal. 236, 11 Pac. 656.

[48] MacLeod v. Moran (1908), 153 Cal. 97, 94 Pac. 604.

[49] Kennedy v. Nunan (1877), 52 Cal. 326; Brown v. Campbell (1893), 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; Godfrey v. Monroe (1894), 101 Cal. 224, 35 Pac. 761.

[50] This was decided differently in Fuquay v. Stickney (1871), 41 Cal. 583; but this case was overruled without mention in Williams v. Santa Clara Mining Ass'n (1884), 66 Cal. 193, 5 Pac. 85, and expressly overruled in Hollywood Lumber Co. v. Love (1909), 155 Cal. 270, 100 Pac. 698.

[51] Warren Co. v. All Persons (1908), 153 Cal. 771, 96 Pac. 807.

Digitized by Google

an incumbrance but a conveyance of the legal title under section 1475 of the Code of Civil Procedure. Therefore, where a homestead has been declared on property, and the homestead is mortgaged, and then the mortgagor dies, the mortgagee must present a claim or lose all rights under the mortgage. No claim need be presented, however, under a trust deed, in order to preserve the trustee's right of sale.[52] Again, when the statute of limitations bars a recovery on a note secured by mortgage all rights under the mortgage, either by foreclosure or by an exercise of the power of sale, are lost. In a deed of trust, the legal title in the trustee preserves the security after the personal obligation is at an end.[53]

Most of the decisions and reasoning in the above cases can be harmonized on practical grounds and to a certain extent on theoretical.

The first decisions upholding a trust deed gave them about the same effect as would be given under the English system. Then follow such cases as Powell v. Patison[54] and the opinions of Mr. Justice Temple, where such expressions as the following are used:

> "The passing of the legal title in such cases is mostly ideal. It is deemed to have passed only for the purpose of enabling the trustee to convey a title. In all other respects the title remains in the trustor, and is still the right by which he holds that which is his."[55]
>
> "In effect they [trust deeds] are mortgages with power to sell."[56]

---

[52] Weber v. McCleverty (1906), 149 Cal. 316, 86 Pac. 706.

[53] Grant v. Burr (1880), 54 Cal. 298; Travelli v. Bowman (1907), 150 Cal. 587, 89 Pac. 347, where the trust deed was reformed after the note had outlawed. The trust deed has the advantage that the statute of limitations does not run in favor of junior lienors and incumbrancers. That the statute bars the power of sale, see Goldwater v. Hibernia Sav. etc. Soc. (1912), 19 Cal. App. 511, 12 Pac. 861, 126 Pac. 863; Faxon v. All Persons (1913), 166 Cal. 707, 137 Pac. 919.

[54] (1893), 100 Cal. 234, 34 Pac. 676.

[55] Herbert Craft Co. v. Brian (1902), 6 Cal. Unrep. Cas. 923, 68 Pac. 1020; in Savings & Loan Soc. v. Burnett (1894), 4 Cal. Unrep. Cas. 701, 37 Pac. 180, it was said that the trustees were but donees of a power (opinion by Haynes, C.), superseded by opinion in bank (1895), 106 Cal. 514, 39 Pac. 922.

[56] Hodgkins v. Wright (1900), 127 Cal. 688, 60 Pac. 431. In this case it is said, "Trust deeds, to secure payment of a debt, are an anomaly in our system, and one admittedly inconsistent with the policy of this state in regard to mortgages. It is at least doubtful if they would be now sustained but for a line of decisions made before they were very seriously questioned."

Digitized by Google

In the effort to minimize the difference between these two forms of security and reduce the trust deed to a power of sale under a mortgage, Mr. Justice Temple represented a tendency to scrutinize rather critically sales by trustees. The moral effect of his opinions would have been to raise considerable doubt as to the value of this form of security. As we have seen, however, these department opinions were overruled[57] and the modern line of decisions may be said to rest upon the principle that wherever it is necessary to preserve the security of trust deeds the courts will go as far as the courts in England in giving effect to the passage of the legal title to the trustees. Thus, a sale for more than is due will be upheld.[58] The statutes of limitations will not bar the title to sell.[59] Indeed, the courts will go further and give a trustee some of the rights of a mortgagee, as when the trust deed is considered a mere incumbrance under the mechanics' lien law.[60] In short, full effect will be given to the passage of title when it will result in making the debtor pay his debt or validate the title of a purchaser under the trustee's sale. On the other hand, subject to the right of the trustee to secure the payment of the debt, the grantor of a deed of trust deals as freely with the property as if he were the legal owner; as freely as if no trust deed had been given. The tendency of the court to disregard the legal title wherever it is not necessary for the security of the creditor probably constitutes some departure from the English theory and practice. The conception of a trust is anomalous anyway. According to Maitland the right of a *cestui que trust* is neither a right *in rem* nor a right *in personam,* but something of both.

> "But if this be so, why is it that the rights of *cestui que trust* come to look so very like real proprietary rights, so like ownership, so that we can habitually speak and

---

[57] Supra n. 55.

[58] Supra n. 55.

[59] Supra n. 53. There must also be considered as overruled such cases as Partridge v. Shepard (1886), 71 Cal. 470, 12 Pac. 480, where in an action of ejectment the court held that the defendant rightly offered in evidence a deed of trust that had been given by the plaintiff. Also the intimation to the same effect of two judges in Larue v. Chase (1870), 1 Cal. Unrep. Cas. 613.

[60] Supra n. 50. The early cases were consistent in making the trustee take the burden as well as the benefit of the legal title.

Digitized by Google

think of him as the owner of lands and goods? Part of the answer has already been given. As regards (if I may be allowed the phrase) their internal character these equitable rights are treated as analogous to legal rights in lands or goods—I mean as regards duration, transmission, alienation. But the whole answer has not yet been given. We are examining the external side of these rights, asking against whom they are good, and we shall find that even when examined from this point of view they are like, misleading like, *jura in rem*."[61]

The mortgagor in England probably has more real proprietary rights than the owner of any equitable interest. But in the last analysis his rights are treated as equitable, as a mere right *in personam*.

"Put the case that he does sell and does convey to a purchaser, the mortgagor will in all probability be able to get back that land from the purchaser, to redeem it out of the purchaser's hands. But mark these words 'in all probability.' It is not very likely that this land will come to the hands of a bona fide purchaser for value who has obtained the legal estate without notice of the mortgagor's right to redeem—still this is conceivable, for occasionally men are hardy enough to forge title deeds—well in that case we shall find out that the sale and conveyance by the mortgagee who had been given no power of sale is not a nullity—the purchaser, perhaps a subpurchaser, will be able to laugh at the merely equitable rights of the mortgagor."[62]

"We often say that, subject to the mortgage, Doe is still tenant in fee simple. But remember what this means. So soon as the day appointed for payment of the money has gone by, Doe's rights are purely equitable rights—in many respects they are like the rights of a *cestui que trust*—that is to say, they will not hold good against a purchaser who gets the legal estate bona fide for value, and without notice."[63]

Put an analogous case in California. A grants to B, in trust for C in order to secure payment of a note to C. The deed is not recorded. B then forges a deed absolute from A to B and records the same. B then conveys the property to D, a bona fide purchaser. Would the courts accept the logical

---

[61] Maitland, Equity, 117.
[62] Maitland, Equity, 275.
[63] Maitland, Equity, 281.

Digitized by Google

consequences of the legal title theory and give D the property, or would they hold that a trust deed passes no title to convey, except in subordination to the trust? It is not contended that the law must of necessity accord with formal logic and that a right must be either *in rem* or *in personam*. The departure from this logical division, however, by the creation of rights which are neither *in rem* nor *in personam*, but something of both, according to the attitude of the particular court, has resulted in much unnecessary confusion. It certainly shows the value of accurate juristic analysis as a foundation for law.[64] The passage of the legal title is entirely unnecessary for security. The mortgagee is amply protected in California by giving him a lien in place of the legal title. This is a right *in rem* and not a mere right *in personam*.[65] It is seldom that any practical difficulty arises as to the nature of the right, for the recording acts give an opportunity to make a right *in rem* of almost any instrument affecting the title to or possession of real property.[66]

This tendency of the California courts to make the trust deed operative wherever necessary to assist the creditor in the recovery of his debt and inoperative for all other purposes is illustrated by cases where the conveyance is made in trust to the creditor himself. Apparently, such conveyances may be recognized as trust deeds and yet foreclosed as mortgages.[67] Another interesting line of cases is where A purchases land from B, C advancing the money, taking a note from A and a conveyance from B as security, and executing an agreement to convey to A on payment of the note. Such a transaction is said to partake both of the nature of a mortgage and of a deed of trust. It is a mortgage in that it can be foreclosed; a trust deed in that, while a recovery on the note may be barred by the statute of limitations, the legal title is still effective for the protection of the creditor.[68]

---

[64] Prof. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale Law Journal, 16.

[65] Edgar N. Durfee, Lien or Equitable Theory of Mortgage, 10 Mich. Law Rev. 587; The Lien Theory of Mortgage, 11 Mich. Law Rev. 495.

[66] Cal. Civ. Code, §§ 1158, 1215.

[67] Felton v. Le Breton (1891), 92 Cal. 457, 28 Pac. 490; Mayhall v. Eppinger (1902), 137 Cal. 5, 69 Pac. 489.

[68] Campbell v. Freeman (1893), 99 Cal. 546, 34 Pac. 113; Woodard v. Hennegan (1900), 128 Cal. 293, 60 Pac. 769; Meeker v. Shuster (1906),

Digitized by Google

A parol trust in a mortgage has been sustained.

> "The decided cases are clearly to the effect that such an agreement as the one under consideration is valid and binding upon the parties. In this state a mortgage conveys no estate in the land, but is a simple lien upon the property. This being true, a transaction of this kind is not within the provisions of the code that an express trust in lands cannot be created except by an agreement in writing or a parol agreement fully executed. Being but a personal chattel, 'a parol trust may attach to a mortgage that the mortgagee shall hold it in trust for his own benefit, and in part for the benefit of another.' "[69]

An agreement by which the trustee of a trust deed agreed to hold the legal title on a parol trust would apparently be void. The grounds of the decision in Tapia v. Demartini seem like fictitious reasoning employed to reach a right result. Whether the mortgagee has the legal title or a mere lien, his right is a right in real property, not personal. The validity of the parol trust in a mortgage rests on other grounds, namely, that the debt is the principal thing and the security the incident. There is no prohibition against declaring a parol trust in the debt, for the debt is personalty, although it carries with it the security. The beneficiary of a trust deed holding a note secured thereby could declare a parol trust in the note which would incidentally carry with it a right to the security. In a way, the creditor has a more easily transferable security under a trust deed than by taking a mortgage. Under a trust deed he can transfer the note and the holder of the note can order the trustee to sell. But the transferee of a note secured by mortgage must record an assignment of the mortgage before asserting his right.[70]

III

The distinction between trust deeds and mortgages thus affects numerous property and procedural rights. No one can tell what cases will arise in the future where the court must

---

4 Cal. App. 294, 87 Pac. 1102; Prefumo v. Russell (1906), 148 Cal. 451, 83 Pac. 810; Hooper v. Young (1909), 10 Cal. App. 590, 102 Pac. 950. If there is doubt, the instrument is considered a mortgage, Godfrey v. Monroe (1894), 101 Cal. 224, 35 Pac. 761.

[69] Tapia v. Demartini (1888), 77 Cal. 383, 19 Pac. 641.

[70] Stockwell v. Barnum (1908), 7 Cal. App. 413, 94 Pac. 400.

Digitized by Google

again determine whether to give effect to or ignore the legal title in the trustee. The above differences, and others which will doubtless occur to the reader, make the practice of the law interesting by complicating the game and adding to its difficulties. An advantage is given to the industrious and ingenious lawyer. Such artificialities, however, offend against scientific legal theory and their productiveness of litigation should hardly commend them to the business world.

Of the two forms of security, which is the better? Most of the advantages to the creditor lie with the trust deed. Yet there are serious defects in the creditor's rights as well as in the debtor's. The lack of a speedy and easy means for the purchaser to get possession has been mentioned, a difficulty which some have sought to overcome by inserting a provision in the trust deed to the effect that after default and sale the grantor of the trust deed should be deemed a tenant of the purchaser. It hardly seems probable that the courts will sanction such an attempt to get the benefit of the summary proceeding of unlawful detainer where the relation of landlord and tenant does not really exist. From the debtor's point of view the trust deed, and, it may be added, the power of sale in a mortgage, are unfair on account of the possibility of sale on default without adequate notice to the debtor. It may, therefore, be said that the trust deed works to the advantage of tricky loan shark creditors and dishonest debtors. The notice provisions in a trust deed are certainly unfair. As everyone knows the notes secured by mortgage and trust deeds usually run for a short period. The creditor naturally wishes to have the option of calling in his loan in a short time. Usually, however, he chooses to let it run as an investment until the statute of limitations is about to expire. This period, four years in California, is absurdly short, and forces a renewal of the note and mortgage or trust deed at considerable expense when neither the creditor nor the debtor desires it. The dangerous possibility in the trust deed is in the power to sell the debtor's property without his knowledge. The notice provided is usually by publication in a newspaper once or twice a week for three or four weeks. There is not one chance in ten thousand that the debtor will ever see the notice. The time has long since gone by, even in the rural districts, where

Digitized by Google

the county newspaper is read by its subscribers from beginning to end. In cities, legal notices are generally published in trade or professional journals and hardly anybody reads them. Notice by publication in newspapers is a meaningless superstition preserved by tradition from a haunting fear that, because the courts have so long accepted this sham notice as due process of law, they would not recognize actual notice when given. The amount of money wasted in the useless publication of notices must be enormous. It surely ought not to be difficult to remedy this defect in trust deeds and power of sale mortgages. Actual notice could be given by registered mail, by recordation, by service in the manner of a summons in a civil action or by some other means adequate, and not too expensive or burdensome.

The popular remedy proposed for this defect in trust deeds is to add a period of redemption after sale. This was the purport of two bills introduced in the Legislature during the session of 1915,—Assembly Bill number 996, which failed to pass, and Senate Bill number 649, which passed both houses but was pocket vetoed by the Governor. These bills seem objectionable for several reasons. (1) They preserve the distinction between trust deeds and mortgages. In other words, they do not go to the root of the trouble. (2) They add to the differences already existing by providing a time and manner for redemption in trust deeds different from the one year redemption period in mortgages. (3) They adopt from the mortgage its most undesirable feature,—the statutory period of redemption.

It is believed this third objection is sound, although many hold the redemption after sale under mortgage foreclosure to be a most beneficent provision. Reference has been made to the fact that in mortgage sales the property is usually bid in by the mortgagee. Everyone expects him to do it. He is best able to make the purchase because he has the amount of the mortgage invested in the property already, and can complete the purchase without the necessity of raising the entire price as anyone else would have to do. This advantage, which the mortgagee naturally has, tends to discourage other bidders. But this is not all. After a prospective bidder has gone to the trouble involved in making the purchase,—raised the money and paid for title insurance, or for a search of the records, and

Digitized by Google

legal advice, he finds that he cannot get possession for a year, and may not get the property at all if there is a redemption. The one per cent a month interest on a redemption is no compensation at all, particularly if the redemption takes place in a few weeks. What chance has a real estate agent to interest buyers and negotiate a sale under such conditions. A probate sale is worth considering, and the investing public keeps in close touch with such sales. But hardly anyone, except the parties concerned, pays any attention to foreclosure sales. They are not attractive propositions. In a trustee's sale under a trust deed, owing to the inadequacy of our legal procedure, the purchaser does not know when he will get the property. In a mortgage foreclosure sale the purchaser knows he cannot get possession for a year, and may not get the property at all, owing to the statutory period of redemption. Under such circumstances, is it any wonder that bankers and real estate men often advise clients to have nothing at all to do with mortgage or trustee sales? This, of course, injures the debtor. The law which was designed to prevent a forfeiture creates one by making a sale impracticable, thus virtually forfeiting the property to the creditor unless the debtor can realize something from a sale or mortgage of the right of redemption, not always an easy thing to do and usually expensive. Such are the consequences flowing from this spurious right.

Instead of creating a right of redemption after a sale under a trust deed, remedial legislation should, (1) abolish security trust deeds by making them all mortgages. (2) It should provide for adequate notice of sale and fix the date of sale sufficiently far distant to enable the mortgagee to redeem or find a purchaser. Make the time one year, if that seems necessary to protect the mortgagor from losing his property in time of panic or other financial stringency. (3) Let the sale, when made, be absolute, in order to attract buyers and secure the best price. (4) Whether the sale should be judicial, as in France and Germany, or without order of court, as in England and most of the states of this country, is a question worth careful consideration. But in either case some expeditious procedure should be provided for putting the purchaser into possession. (5) The statute of limitations on debts secured by mortgage should be enlarged.

Digitized by Google

There may be interposed the valid objection that the right of redemption after sale is not alone for the benefit of the mortgagor, but equally for the benefit of the junior lienors and incumbrancers, who should, of course, be protected. Some form of notice could be devised which would be reasonable as to them. Certainly the present system is not encouraging to mortgagees subsequent to a deed of trust or to a power of sale mortgage, if no redemption is permitted after such sale. Their rights can be cut off in a month, virtually without notice. A mortgagee after a trust deed takes a long chance.

The law as it stands preserves the enlightened views of collateral security. The creditor cannot keep the security without putting it up for sale, and accounting for any surplus. At the same time he is protected in his right to a sale and to a deficiency judgment. The difficulties are principally in the machinery that has been adapted for carrying out these purposes.

To the lawyer, legislation on these subjects is not a matter of very great importance. The lawyer has learned the present system and can accommodate himself to a change. It is only in case the practical operation of the present system causes sufficient irritation to overcome the natural conservatism of business men and their very proper unwillingness to alter established forms that any legislation will be demanded. If the business world does desire better laws on this subject, there would not be great difficulty in framing them. There are many good models in operation.

A. M. Kidd.

Berkeley, California.

Digitized by Google

An Eighteenth Century Recall of Judges

THE case of the miller Arnold as detailed by Carlyle in his "Frederick the Great" is an interesting story of a judicial recall. Arnold and his predecessors held a mill, called *Krebsmuhle,* Crabmill, on a certain stream in Prussia from Graf von Schmettau. A certain Freiherr von Gersdorf on the same stream diverted water for a fishpond, the result of which was that Arnold was unable to run his mill and defaulted in his payments to his landlord. The latter finally sued for his rent, with the result that Arnold was ousted from his mill. The case went through all the courts of the province of Cüstrin, and finally was referred by the King to the *Kammergericht* in Berlin. This tribunal affirmed the action of the other courts. Carlyle proceeds:

"It was Friday 10th December 1779 before Friedrich got this fine bit of news; Saturday 11th, before he authentically saw their Sentence. He is lying miserably ill of gout in the Schloss of Berlin; and I suppose, since his Father, of blessed memory, took cudgel to certain Judges and knocked out teeth from them, and broke the judicial crowns, nobody in that Schloss has been in such humour against men of Law. 'Attend me here at 2 P. M. with the Three Raths who signed in Arnold's Case:' Saturday, about 11 A. M., Chancellor Fürst receives this command; gets Rannsleben, and two others, Friedel, Graun,—and there occurred such a scene— But it will be better to let Rannsleben himself tell the story; who has left an *Autobiography,* punctually correct, to all appearance, but except this alone notable passage of it, still unpublished, and like to continue so. . . . .

" 'At 1 o'clock I drove to the Grand-Chancellor's, where I found the Raths Friedel and Graun already arrived. The Chancellor, old Fürst, instructed us as to what we had to do when we came before the King. And then, towards 2 o'clock, he took us in his carriage to the Palace. We entered the room immediately at the end of the Great Hall. Here was found a heyduc (tall porter), by whom the Chancellor announced to the King that we were here. Heyduc soon came back to inquire, Whether the *Cabinets-Rath* Stellter, a Secretary or Short-hand writer of his

Digitized by Google

Majesty's, had arrived yet; and whether we (*we*, what a doubt) were Privy Councillors. We were then shortly after shown in to the King. We passed through three rooms, the second of which was that in which stands the *Confidenz Tafel* (Table that goes by pulleys through the floor, and comes up refurnished, when you wish to be specially private with your friends). In the fourth, a small room with one window, was the King. The Chancellor walked first; I followed him close; behind me came the Rath Friedel, and then Graun. Some way within, opposite the door, stood a screen; with our backs to this, the King-ward side of this, we ranged ourselves,—in respectful row of Four, Fürst at the inward end of us (right or left is no matter). The King sat in the middle of the room, so that he could look pointblank at us; he sat with his back to the chimney, in which there was a fire burning. He had on a worn hat, of the clerical shape (old-military in fact, not a shovel at all); *cassaquin*, short dressing-gown, of red-brown (*mordore*) velvet; black breeches, and boots which came quite up over the knee. His hair was not dressed. Three little benchlets or stools, covered with green cloth, stood before him, on which he had his feet lying (terribly ill of gout). In his lap he had a sort of muff, with one of his hands in it, which seemed to be giving him great pain. In the other hand he held our Sentence on the Arnold Case. He lay reclining (*lag*) in an easy chair; at his left stood a table, with various papers on it,—and two gold snuff-boxes, richly set with brilliants, from which he kept taking snuff now and then.

"Besides us, there was present in the room the *Cabinets-Rath* Stellter (of the short-hand), who stood at a desk, and was getting ready for writing. The King looked at us, saying 'Come nearer.' Whereupon we advanced another step, and were now within less than two steps of him. He addressed himself to us three Raths, taking no notice at all of the Grand-Chancellor:

King. "Is it you who drew-up the judgment in the Arnold case?"

We (especially I, with a bow). "Yea."

" 'The King then turned to the Rath Friedel (to Friedel, as the central figure of the Three, perhaps as the portliest, though poor Friedel, except signing, had little cognisance of the thing, in which not he but Rannsleben was to have been spokesman), and addressed to Friedel those questions, of which, with their answers,

Digitized by Google

there is Protocol published, under Royal authority, in the Berlin newspapers of December 14th, 1779; Short-hand Stellter taking down what was said,—quite accurately, testifies Rannsleben. From Stellter (that is to say from the 'Protocol' just mentioned), or from Stellter and Rannsleben together, we continue the Dialogue:

King to Friedel (in the tone of a Rhadamanthus suffering from gout). "To give sentence against a Peasant from whom you have taken wagon, plough and everything that enables him to get his living, and to pay his rent and taxes: is that a thing that can be done?"

Friedel (and the two Mutes, bowing). "No."

King. "May a Miller who has no water, and consequently cannot grind, and therefore, not earn anything, have his mill taken from him, on account of his not having paid his rent: is that just?"

Friedel (and Mutes as aforesaid). "No."

King. "But here now is a Nobleman, wishing to make a Fish-pond: to get more water for his Pond, he has a ditch dug, to draw into it the water from a small stream which drives a water-mill. Thereby the Miller loses his water, and cannot grind; or, at most, can only grind in the spring for the space of a fortnight, and late in the autumn, perhaps another fortnight. Yet, in spite of all this, it is pretended that the Miller shall pay his rent quite the same as at the time when he had full water for his mill. Of course, he cannot pay his rent; his incomings are gone. And what does the Cüstrin Court of Justice do? It orders the mill to be sold, that the Nobleman may have his rent. And the Berlin Tribunal"—Chancellor Fürst, standing painfully mute, unspoken to, unnoticed hitherto, more like a broomstick than a Chancellor, ventures to strike in with a syllable of emendation, a small correction, of these words "Berlin Tribunal"—

Furst (suggestively). "Kammergericht" (mildly suggestive, and perhaps with something in his tone which means, "I am not a broomstick"): "Kammergericht!"

King (to short-hand Stellter). "Kammergerichts-Tribunal:"—(then to Fürst) "Go you, Sir, about your business, on the instant! Your Successor is appointed; with you I have nothing more to do. Disappear."—'Ordered,' says Official Rannsleben, 'ordered the Grand-Chancellor, in very severe terms, To be gone.' telling him that his Successor was already appointed. Which order Herr von Fürst, without saying a word, hastily obeyed, passing in front of

Digitized by Google

us three, with the utmost speed.' In front,—screen, I suppose, not having room behind it,—and altogether vanishes from Friedrich's History; all but some *ghost* of him (so we may term it), which reappears for an instant once.

King (continues to Friedel, not in a lower tone probably):—"the Kammergerichts-Tribunal confirms the same. That is highly unjust; and such Sentence is altogether contrary to his Majesty's landsfatherly intentions:—my name" (you give it, 'In the King's Name,' forsooth) "cruelly abused!"

"The King's desire always is and was, That everybody, be he high or low, rich or poor, get prompt justice; and that, without regard of person or rank, no subject of his fail at any time of impartial right and protection from his Courts of Law.

"'Wherefore, with respect to this most unjust Sentence against the Miller Arnold of the Pommerzig Crabmill, pronounced in the Neumark, and confirmed here in Berlin, his Majesty will establish an emphatic example (*ein nachdrueckliches Exempel statuiren*); *to* the end that all Courts of Justice, in all the King's Provinces, may take warning thereby, and not commit the like glaring unjust acts. For, let them bear in mind, That the least peasant, yea, what is still more, that even a beggar, is, no less than his Majesty, a human being, and one to whom due justice must be meted out. All men being equal before the Law, if it is a prince complaining against a peasant, or *vice versa*, the prince is the same as the peasant before the Law; and, on such occasions, pure justice must have its course, without regard of person: Let the Law-Courts, in all the Provinces, take this for their rule. And whenever they do not carry out justice in a straightforward manner, without any regard of person and rank, but put aside natural fairness,—then they shall have to answer his Majesty for it (*sollen sie es mit Seiner Koeniglichen Majestat zu thun kriegen.*) For a Court of Law doing injustice is more dangerous and pernicious than a band of thieves: against these one can protect oneself; but against rogues who make use of the cloak of justice to accomplish their evil passions, against such no man can guard himself. These are worse than the greatest knaves the world contains, and deserve double punishment.

"For the rest, be it also known to the various Courts of Justice, That his Majesty has appointed a new Grand-Chancellor. Fürst dismissed. Yet his Majesty will not the less look sharply with his own eyes after the Law-proceedings in all the Provinces; and he

Digitized by Google

commands you—that is, all the Law-courts—urgently herewith: *Firstly,*—which is also lastly,—To proceed to deal equally with all people seeking justice, be it prince or peasant; for, there, all must be alike. However, if his Majesty, at any time hereafter, come upon a fault committed in this regard, the guilty Courts can now imagine beforehand how they will be punished with rigour, President as well as Raths, who shall have delivered a judgment so wicked and openly opposed to justice. Which all Colleges of Justice in all his Majesty's Provinces are particularly to take notice of.

Mem. By his Majesty's special command, measures are taken that this Protocol be inserted in all the Berlin Journals."

"The remainder of Rannsleben's Narrative is beautifully brief and significant.—'We had hardly left the room, said he *supra*, when the King followed us, lame as he was, with a fulminant "Wait there." Rannsleben continues: 'Shortly after came an Aide-de-Camp, who took us in a carriage to the common Town-prison, the Kalandshof; here two Corporals and two Privates were sent to guard us. On the 13th December 1779, third day of our arrest, a Cabinet-Order was published to us, by which the King had appointed a Commission of Inquiry; but had, at the same time, commanded beforehand that the Sentence should not be less than a year's confinement in a fortress, dismissal from office, and payment of compensation to the Arnold people for the losses they had sustained. Which certainly was a bad outlook for us.

"Precisely the same has befallen our Brethren of Cüstrin; all suddenly packed into Prison, just while reading our Approval of them;—there they sit, their Sentence to be like ours. Our arrest in the Kalandshof lasted from 11th December, 1779 till 5th January 1780, three weeks and three days,— when (with Two Exceptions, to be noted presently) we were all, Kammergerichters and Cüstriners alike, transferred to Spandau."

The result of the recall is detailed by Carlyle in a quotation from an account given by an eye witness.

"During the days that followed I often crossed in the forenoon, the Esplanade in front of the Palace (Schlossplatz), at that side where the King's apartments were; the same which his Royal Highness, the Crown Prince now (1833) occupies. I remember that here, on that part of the Esplanade which was

Digitized by Google

directly under Friedrich's windows, there stood constantly numbers of Peasants, not ten or twelve, but as many as a hundred at a time; all with petitions in their hands, which they were holding up towards the window shouting, "Please his Majesty to look at these; we have been still worse treated than the Arnolds!" And indeed, I have understood the Law Courts for some time after, found great difficulty to assert their authority—the parties against whom judgment went, taking refuge in the Arnold precedent, and appealing direct to the King."

Even Frederick found opposition in carrying out his arbitrary decree concerning the chancellor and the Judges. Minister von Zedlitz refused to pronounce the sentence. The King writes Zedlitz as follows:

"Your Report of the 20th instant in regard to Judgment on the arrested Raths has been received. But do you think I don't understand your Advocate fellows and their quirks; or how they can polish-up a bad cause, and by their hyperboles exaggerate or extenuate as they find fit? The Goose-quill class (*Federzeug*) can't look at facts. When Soldiers set to investigate anything, on an order given, they go the straight way to the kernel of the matter; upon which, plenty of objections from the Goose-quill people!—But you may assure yourself I give more belief to an honest Officer, who has honour in the heart of him, than to all your Advocates and sentences. I perceive well they are themselves afraid, and don't want to see any of their fellows punished.

"If, therefore, you will not obey my Order, I shall take another in your place who will; for depart from it I will not. You may tell them that. And know, for your part, that such miserable jargon (*miserabel Styl*) makes not the smallest impression on me. Hereby, then, you are to guide yourself; and merely say whether you will follow my Order or not; for I will in no wise fall away from it. I am your well-affectioned King,—FRIEDRICH."

Von Zedlitz continuing his refusal, the King himself pronounced the sentence. With the exception of one of the Cüstrin judges who had dissented, and of Rannsleben, who had acted with impartiality, the other judicial officers are "one and all dismissed from office (*cassirt*), and condemned to one year's Fortress Arrest. Furthermore, they shall pay to Arnold the value of his Mill, and make good to him, out of their own pockets, all the loss and damage he has suffered in this business."

Digitized by Google

The sequel of the story is found in the reign of Frederick's successor, Frederick William II. The sentence of Frederick was reversed and Arnold ordered to pay back the money paid him by the condemned judges, and also the purchase money of the mill, if he desired to keep it. "All which moneys, however, his majesty Friedrich Wilhelm II, Friedrich's successor, to have done with the matter, handsomely paid out of his own pocket: the handsome way of ending it."

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year Single Copies, 50 Cents

ORRIN K. McMURRAY, Editor-in-Chief

J. D. RINEHART, Student Editor-in-Chief

Faculty Board of Editors

A. M. KIDD

WM. CAREY JONES A. P. MATTHEW
WM. E. COLBY M. C. LYNCH
M. E. HARRISON J. U. CALKINS, Jr.

Student Board of Editors

V. M. AIROLA LYMAN GRIMES
ARTHUR ALLYN O. F. MONTANDON
J. C. ALTMAN J. S. MOORE, Jr.
MISS E. B. BROUGHTON J. B. OLIVER
A. H CONARD C. R. SALISBURY
T. A. J. DOCKWEILER E. J. SINCLAIR
G. H. GOBAR G. W. WORTHEN

EDITORIAL NOTES

AMENDMENTS IN APPELLATE PROCEDURE.

AMONG the measures passed by the legislature which has just closed its labors, those relating to new trials and appeals, the result of the efforts of committees from the San Francisco Bar Association, the Commonwealth Club and the State Bar Association should, perhaps, be noticed in this place. The net result of the bills will be to simplify and expedite to a large extent appellate procedure and proceedings upon motion for a new trial in the trial court. There are practically four cardinal features in these amendments.

Digitized by Google

(1) All appeals, whether from final judgments or from appealable orders, must be taken within sixty days. A judgment, therefore, becomes final in sixty days instead of six months.

(2) The appeal from the order denying a new trial is abolished, and the appeal from the order granting a new trial is also abolished, except in the instance where the case was tried by a jury. The purpose of the exception (as to the necessity of which there exists grave doubt) is, of course, to concede a greater force to a jury's verdict than to the decision of a trial judge. A case might be imagined where an arbitrary or unjust judge might set aside a jury's verdict, and the legislature doubtless had in mind such a judge in making this exception. The measure makes it possible, however, for the trial judge to set aside his decision in a case tried without a jury as often as he pleases, without the possibility of review. We believe this to be one of the special merits of the plan. It works most effectively in the direction of producing elasticity in procedure, and can hardly be imagined as the subject of abuse.

(3) Motions for a new trial may still be made, though, in general, as just pointed out, the trial court's order is not reviewable. But the practice upon such motions is much simplified. Instead of preparing a bill of exceptions or statement on motion for a new trial, the party seeking to have a new trial granted merely gives a general notice of intention within ten days after service of the notice of the decision or within ten days after verdict (which time cannot, even by stipulation, be extended). His motion is then made orally at the earliest opportunity, merely referring to notes or the reporter's transcript of the testimony. The procedure is that now obtaining in the case of the motion on the minutes of the court, simplified by the provision that the notice of intention to move for a new trial need not specify the particular errors relied upon. If the motion be denied, the appeal is taken from the judgment, and upon that appeal all matters may be reviewed which might formerly have been reviewed on the appeal from the order denying the new trial. The tendency of practitioners will doubtless be in the direction of taking an appeal directly from the judgment, either upon a bill of exceptions, or in the so-called alternative method, rather than moving for a new trial in the lower court.

Digitized by Google

(4) The most mechanical feature in the new system is the limitation on the power of the trial court to grant a new trial. This must be done within three months from the verdict or notice of decision, and the court's power expires at that time. This may prove harsh in individual cases, but the tendency of the rule will be to force the appeal from the judgment as the almost universal practice. In order to avoid possible injustice, it is provided that the party asking for a new trial may have thirty days after the automatic denial of the motion to appeal from the judgment.

O. K. M.

SCHOOL OF JURISPRUDENCE NOTES.

PROFESSOR FRANCIS S. PHILBRICK has been added to the faculty of the School of Jurisprudence of the University of California. His work will be primarily centered upon legal history and comparative law. Professor Philbrick holds a Ph.D. degree from Harvard University, and an LL.B. from the Columbia Law School, and has also pursued his studies at Berlin, Paris and Madrid. His work as a scholar embraces translations in the "General Survey of Continental Legal History" in the Continental Legal History series, of the portion of that work covering the legal history of Germany, legal history of Switzerland, and legal history of Spain. He is also the translator of Professor Hübner's "History of Germanic Private Law." He has also been engaged in work in the editing of the Eleventh Edition of the Encyclopaedia Britannica. As a practicing lawyer, in New York, he has been associated in some important cases. During the coming year he will teach Elementary Law, First Year Property, and Comparative Law.

Professor Barry Gilbert who has been absent on leave during the last half year will resume his work in Contracts, Equity, Bankruptcy, and Damages. The courses in Roman Law and Jurisprudence will be given by Mr. Farnham P. Griffiths. Professor McMurray will offer a new course in the history of Anglo-American Legal Institutions. He will also resume the editorship of the California Law Review after a year's leave of absence. A course in Insurance Law, by Mr. Arthur Tasheira,

Digitized by Google

has been added to the curriculum. Professor George H. Boke who spent the last year as Exchange Professor at Yale has been granted a leave of absence for the coming year.

During the past year a new edition of Blackstone's Commentaries has been prepared by Professor William Carey Jones, Director of the School. He expects to publish this work before the opening of the University in August.

M. C. L.

Digitized by Google

Comment on Recent Cases

ADVERSE POSSESSION: PROPERTY HELD BY MUNICIPAL CORPORATION: USE FOR ULTRA VIRES PURPOSES.—The question as to whether a municipal corporation can gain title by adverse possession to land held for other than municipal purposes was presented to the California courts for the first time in the case of *Beckett v. The City of Petaluma.*[1] The court in upholding such a title in the city was clearly in line with the few authorities on the subject.[2]

The case is interesting, not only because it is the latest case dealing with the question, and the first arising in California, but also because it serves to bring out the real nature of a title gained by adverse possession. In the first place, title by adverse possession is gained by virtue of the adverse holding of land for the period prescribed by the statute of limitations. In the second place, the term "adverse possession" or "limitation" is properly applicable only to the case of land, while the term "prescription" is properly applied only to such things as at common law lie in grant, i. e., incorporeal hereditaments, such as easements, rights of way, and profits a prendre.[3] Furthermore, a title by adverse possession is based upon a positive rule of law established for the quieting and repose of titles, while title by prescription is nothing more than the conclusive supposition of a grant, which by lapse of time has been lost or destroyed.[4] However, the terms prescription and limitation are often used interchangeably,[5] and to this is attributable much of the confusion in the cases.

The statute of limitations does not profess to confer any title upon the disseisor. Its operation is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of his possession and resting upon the infirmity of the right of others to eject him.[6] As is well stated by Chief Justice Gibson, in Sailor v. Hertzogg[7] " . . . . the statute protects the occupant, not for his merit,

---

[1] (Jan. 8, 1915), 20 Cal. App. Dec. 46, rehearing granted Mar. 8, 1915.

[2] Dillon, Municipal Corporations, 5th ed., p. 1561, note; New Shoreham v. Ball (1884), 14 R. I. 566.

[3] 2 Bl. Com. 264.

[4] Minor and Wurts, Real Property, 1st ed., § 844; Tracy v. Atherton (1864), 36 Vt. 503.

[5] Mather v. Trinity Church (1816), 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; L. & N. Ry. Co. v. Smith (1907), 125 Ky. 336, 101 S. W. 317, 128 Am. St. Rep. 254.

[6] Dixon v. Gayfere (1853), 17 Beav. 421, 51 Eng. Repr. 1097, 1101.

[7] (1845), 2 Pa. St. 182, 185.

Digitized by Google

for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten or witnesses dead". The title of the disseisor is only made perfect by rendering the rightful owner powerless to defeat it, either by entry or by ejectment.[8] The practical effect of this is to constitute the statute of limitations a source of title to the occupant, to which he may appeal to sustain an action of ejectment against the rightful claimant or a third person.[9]

The California statute recognizes the practical effect of this theory and expressly provides that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of property confers a title thereto which is sufficient against all.[10] The obvious effect of this is to give the disseisor a title from a new source, than which none can be better or more absolute[11] in effect, although, as a practical matter, it may be unmarketable, because not a perfect title of record until quieted against the holder of the record title.

Since a title by adverse possession is really based upon the laches of the real owner or disseisee, it is immaterial that the person claiming such a title is under a legal disability, for instance that of infancy.[12] An alien may acquire such a title, and no one but the state can question his right to hold the land thus gained.[13] So also a private corporation may gain a title by virtue of the running of the statute, even though holding the land is ultra vires or directly prohibited by statute.[14] The same rule is logically applicable to the situation in the principal case, leaving the title of the city unimpeachable except by the state, or possibly, by a taxpayer.[15]

A. A.

ATTACHMENT: RESIDENCE: FOREIGN CORPORATIONS.—In *Jennings v. Idaho Railway, Light & Power Company,*[1] it was held that a foreign corporation which has complied with the laws of Idaho

---

[8] Tiedeman, Real Property, 2nd ed., § 717.

[9] Minor and Wurts, Real Property, 1st ed., § 820.

[10] Cal. Civ. Code, § 1007.

[11] Woodward v. Farris (1895), 109 Cal. 12, 18, 41 Pac. 781.

[12] Woodruff v. Roysden (1900), 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. Rep. 905.

[13] Scottish American Mortgage Co. v. Butler (1911), 99 Miss. 56, 54 So. 666, Ann. Cas. 1913-C, 1236; Overing v. Russell (1860), 32 Barb. (N. Y.) 263.

[14] Myers v. McGavock (1894), 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

[15] Beckett v. Petaluma (Jan. 8, 1915), 20 Cal. App. Dec. 46, 53. (Under § 325 Cal. Code Civ. Proc. payment of taxes levied and assessed upon land is a necessary element of adverse possession. A taxpayer may enjoin the application of city funds to illegal or ultra vires purposes. Dillon, Municipal Corporations, 5th ed., §§ 1579-1587).

[1] (Idaho, Jan. 20, 1915), 146 Pac. 101.

Digitized by Google

respecting such corporations, is a non-resident of the state, and that its property is subject to attachment under a statute that permits the property of a defendant not residing in the state to be attached. The court based its decision upon the proposition that the domicile, residence, and citizenship of a corporation are in the state where it is created, and that unless a corporation is domesticated it can have but one domicile, one residence, and one citizenship, which is in the state issuing its charter, and that therefore foreign corporations complying with the laws of a state do not occupy the same position with reference to attachment laws as domestic corporations.

It has been very generally held, and for many different purposes, in language which is possibly too broad, that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of a corporation is in the state by which it is created.[2] Thus the federal courts will not take jurisdiction of a case against a foreign corporation doing business in a state, where the plaintiff does not reside in the state.[3] The various states permit foreign corporations to be sued in their courts, by reason of the fact that the question of jurisdiction is not so much one of residence as one of finding a corporation within the borders of a state.[4] One view of the question of venue is that a foreign corporation may be sued in any county of the state,[5] while another is that it should be sued at its principal place of business within such state.[6] But as residence is more truly an attribute of a natural person than of an artificial one, whether a corporation is to be considered a resident of a particular place by virtue of its doing business there, depends entirely upon the connection in which the problem arises and where the problem is one of statutory construction it should be solved in the light of the purposes of the act.[7] It is probably in view of this that foreign corporations are generally held to be within the statutes authorizing attachment against non-residents.[8]

---

[2] Shaw v. Quincy Mining Co. (1892), 145 U. S. 444, 12 Sup. Ct. Rep. 935, 36 L. Ed. 768.

[3] Stone v. Chicago, B. & Q. R. R. Co. (1912), 195 Fed. 832; Shaw v. Quincy Mining Co., supra, note 2.

[4] Wiar v. Wabash R. R. Co. (1911), 151 Ia. 121, 130 N. W. 794.

[5] Waechter v. Atchison, etc. Ry. Co. (1909), 10 Cal. App. 70, 101 Pac. 4. This case decides that Cal. Const. art. 12, § 16 does not apply to foreign corporations. Thomas v. Placerville Gold Quartz Mining Co. (1884), 65 Cal. 600, 4 Pac. 641; Boyer v. Northern Pac. R. R. Co. (1901), 8 Idaho 74, 66 Pac. 826, 70 L. R. A. 691.

[6] Wiar v. Wabash R. R. Co., supra note 4.

[7] Kimmerle v. Topeka (1912), 88 Kan. 370, 128 Pac. 367.

[8] Iroquois Furnace Co. v. Wilkin Mfg. Co. (1899), 181 Ill. 582, 54 N. E. 987, reversing 77 Ill. App. 59; Cook & Son Mining Co. v. Thompson (1909), 110 Va. 369, 66 S. E. 79; Voss v. Evans Marble Co. (1902), 101 Ill. App. 373; Albright v. United States Clay Production Co. (1904), 5 Pen. (Del.) 198, 62 Atl. 726; but see, contra, Burr v. Co-operative Construction Co. (1911), 162 Ill. App. 512, distinguishing between residence and citizenship.

Digitized by Google

This is generally the rule although the corporation has complied with all state statutes,[9] some states, however, taking a different view.[10] The California courts have not determined as yet whether our statute, which also provides for attachments against non-residents, permits an attachment of the property of a foreign corporation,[11] but in view of the general rule on the subject, it probably does. *C. W. S.*

BANK DEPOSITS: JOINT OWNERSHIP WITH RIGHT OF SURVIVORSHIP: GIFTS.—The cases of *Kennedy* v. *Kennedy*[1] and *Boyle* v. *Dinsdale*[2] are examples of the fecundity of the subject of the disposition of deposits in savings banks as a source of litigation. In the former case there was a written contract of deposit by which it was provided that the account was to be joint with a right of survivorship; in the latter there was a deposit in trust in the names of the donees, subject to the right of the donor to take the interest during his life. In both cases the survivors were held to be entitled to the deposits.

The most commonly recurring situations presented to the courts in this sort of cases may be classified as joint deposits, gifts, and deposits in trust.

In the first situation, where there is merely a deposit jointly in the names of the donor and donee, it is clear that the transaction cannot be upheld as a gift either *inter vivos* or *mortis causa* because the donor has not parted with control over the subject matter,[3] although, in California at least, such a transaction will be supported as a trust where there are acts or declarations of the depositor showing an intention to create a trust.[4] The difficulty in such a situation is that, in the absence of any written instrument clearly disclosing the donor's intention in those respects, such intention must be proved entirely by parol.[5] If there is a written instrument executed by the parties declaring their rights or interests respecting the deposit, or the terms under which it is made and is to be held by the bank, little difficulty will be experienced, even if the depositor retains possession of the deposit book.[6]

---

[9] Voss v. Evans Marble Co., supra, note 8; Albright v. United Clay Production Co., supra note 8.

[10] Stonega Coke & Coal Co. v. So. Steel Co. (1910), 123 Tenn. 428, 131 S. W. 988, 31 L. R. A. (N. S.) 278.

[11] Cal. Code Civ. Proc. § 537.

[1] (Feb. 11, 1915), 49 Cal. Dec. 167, 146 Pac. 647.

[2] (Utah, Aug. 20, 1914), 143 Pac. 136.

[3] Robinson v. Mutual Savings Bank (1908), 7 Cal. App. 642, 95 Pac. 533.

[4] Drinkhouse v. German S. & L. Soc. (1911), 17 Cal. App. 162, 118 Pac. 953; Booth v. Oakland Bank of Savings (1898), 122 Cal. 19, 54 Pac. 370.

[5] Denigan v. Hibernia S. & L. Soc. (1899), 127 Cal. 137, 59 Pac. 389.

[6] Kennedy v. Kennedy, note 1, supra; Farrelly v. Emigrant etc. Sav. Bank (1904), 92 App. Div. 529, 87 N. Y. Supp. 54, affirmed in 179 N. Y. 594, 72 N. E. 1141.

Digitized by Google

One of the incidents of the joint tenancy thus created is that, upon the death of one of the joint tenants, the survivor becomes owner of the entirety by survivorship and by virtue of the original grant creating the tenancy.[7] The deposit thus is made subject to withdrawal by either party, although, as a practical matter, the depositor is able to retain effective control over it by merely keeping the bank book in his possession.

In the second case, it is well settled that the mere fact of a deposit in the name of a third party, without delivery of the pass book, or other constructive delivery, will not constitute a gift of the chose in action.[8] To establish the disposition as a valid gift there must be a delivery to the donee, either actual or constructive, as by giving over the deposit book.[9] Where the subject of the purported gift remains or is immediately replaced under the control of the donor, the gift is not complete; in the words of Mr. Chief Justice Beasley, the donor has not completely stripped himself of his dominion over the thing given.[10]

In the third situation, there must be a delivery of the subject matter of the trust to some one for the donee, so as to divest the title and possession of the donor,[11] or there must be acts which will constitute either the donor or a third party, usually the bank, a trustee for the beneficiary.[12] If the circumstances attending the transaction are such as to effect a perfected trust, there is no question that the beneficial title to the funds will pass to the donee. In case the depositor's acts are equivocal, the rule seems to be to seek his intention and to allow such intention to govern.[13] No particular form of words is required to create a trust,[14] but the case of Kennedy v. Kennedy points out the desirability of having the intention clearly expressed, in writing, if possible. Once the trust is established, the circumstance that the donor retains the right to withdraw the deposit does not affect its validity. In this way the donor is able to

---

[7] Estate of Harris (Mar. 31, 1915), 147 Pac. 967; this case does not determine whether or not a creditor would have a right to resort to the estate of a decedent in property held in joint tenancy by him and another person.

[8] Beaver v. Beaver (1893), 137 N. Y. 59, 32 N. E. 998, (reversing 62 Hun. 194, 16 N. Y. Supp. 476). See same case in 117 N. Y. 421, 22 N. E. 940; Meridian Trust & Safe Deposit Co. v. Miller (Conn., 1914), 90 Atl. 223.

[9] Camp's Appeal (1869), 36 Conn. 88, 4 Am. Rep. 39; see note in 22 Harv. Law Rev. 453.

[10] Schippers v. Kempkes (N. J., 1907), 67 Atl. 74; Cook v. Lum (1893), 55 N. J. L. 373, 26 Atl. 803.

[11] Smith v. Ossipe etc. Savings Bank (1887), 64 N. H. 228, 9 Atl. 792.

[12] Mabie v. Bailey (1884), 95 N. Y. 206.

[13] Carr v. Carr (1911) 15 Cal. App. 480, 115 Pac. 261.

[14] Ex parte Pye (1811), 18 Ves. Jun. 141. 34 Eng. Repr. 271; Booth v. Oakland Bank of Savings (1898), 122 Cal. 19, at p. 22, 54 Pac. 370.

Digitized by Google

retain a control over the trust that practically amounts to a power of revocation.[15] There is a division of authority on the question whether there can be a completed trust without some communication of knowledge of it to the beneficiary.[16] The California Code does not require that the beneficiary shall be informed of the trust, and under such circumstances the trust is good so long as it is not rescinded.[17]

The difficulty in these cases lies not in the situations where the depositor has made his intention clear by unequivocal acts, but where he has failed to take the final step to give the joint owner control, or to divest himself of his dominion over the property. The average property owner, either from a lack of confidence in the beneficiary or from reluctance to part with control over his property, lacks the decision to complete the transaction and to make an unequivocal disposition of the deposit.

A. A.

BANKRUPTCY: REVIVAL OF CLAIM BARRED BY STATUTE OF LIMITATIONS.—A, being indebted to his sister, B, in 1906, executed his promissory note in her favor, due one day after its date. In 1914, the claim having been long since barred under the California statute,[1] and A having become insolvent, he addressed a letter to B acknowledging the debt. The letter was written within four months of the filing of a voluntary petition in bankruptcy and with the purpose of renewing the note, so that it might participate in the dividends in bankruptcy; and at the time it was written, B had reasonable cause to believe A insolvent. Under these circumstances, it has recently been held in the case of *In re Blankenship*[2] by the District Court for the Southern District of California that B's claim is provable.

Although the decision is in accord with that of another District Court in a similar case,[3] it would seem to be questionable on principle.

Neither the act of 1867 nor that of 1898 contains any express provision as to outlawed claims. Under the former, there was some conflict of authority as to whether a claim barred by the statute of limitations might be asserted in bankruptcy, but most of the decisions denied such right.[4] So under the present act, it is

---

[15] Booth v. Oakland Bank of Savings (1898), 122 Cal. 19, at p. 26, 54 Pac. 370.

[16] Cunningham v. Davenport (1895), 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, note.

[17] Booth v. Oakland Bank of Savings (1898), 122 Cal. 19, at p. 25, 54 Pac. 370; Cal. Civ. Code, § 2251.

[1] Cal. Code Civ. Proc. § 337.

[2] (Jan. 25, 1915), 220 Fed. 395.

[3] In re Banks (1913), 207 Fed. 662.

[4] The leading case under the act of 1867 is In re Kingsley (1868) Fed. Cas. No. 7,819, decided by Judge Lowell adversely to the outlawed claim. In accord are, In re Hardin (1868), Fed. Cas. 6,048; In

Digitized by Google

held that debts which are barred by the statute of the state where the proceedings are pending and where the bankrupt has resided, cannot be allowed in bankruptcy;[5] that the defense may be raised by any creditor, and that it is the duty of the trustee to assert it.[6] These later decisions view the statute as one of repose, rather than as a mere grant of a personal privilege.[7]

The question of the renewal of an outlawed claim by the bankrupt has arisen principally in connection with the inclusion of such a claim in the schedules signed by him. It is held that this is a revival of the debt as against the bankrupt, because it is his unqualified acknowledgment in writing; and therefore, if the assets are sufficient to pay all the creditors in full, or if the creditors choose to waive the defense of the statute, the claimant is entitled to prove his claim and have it allowed.[8] But the mere statement of a claim in the schedule, it is uniformly held, does not preclude either the trustee or the creditors from objecting to a claim on the ground that it is barred by limitation.[9] "The rights of other creditors to the assets could not be thus prejudiced."[10] It apparently is immaterial whether the schedules were signed after filing the petition, or, as usually happens in voluntary proceedings, shortly before that time.

It is submitted that the decisions on the effect of the schedules are more consonant with the spirit and provisions of the Bankruptcy Act than that in the principal case. From a practical standpoint, it may be extremely dangerous to allow a debtor, on the eve of his bankruptcy, to revive, as against his other creditors, a stale claim, —one which they may be unable to meet with opposing proof, because of the lapse of time. Moreover, the theory of the act is that to a certain extent the creditors have such an equity in the bankrupt's property as may not ordinarily be destroyed by his acts within the four months preceding bankruptcy. His preferences, except to creditors ignorant of his insolvency, and any preferences gained by legal proceedings, during this time, are annulled. And it has been held, though there is no express provision warranting it, that an assignment for the benefit of creditors, without

---

re Cornwall (1871), Fed. Cas, 3,250; In re Noesen (1875), Fed. Cas 10,288; In re Reed (1874), Fed. Cas. 11,635; In re Doty (1877), Fed. Cas. 4017. Contra, In re Ray (1867), Fed. Cas. 11,589; In re Shepard (1868), Fed. Cas. 12,753.

[5] In re Lipman (1899), 94 Fed. 353; In re Resler (1899), 95 Fed. 804; In re Wooten (1902), 118 Fed. 670; In re Lafferty (1903), 122 Fed. 558. See In re Putman (1911), 193 Fed. 464, as to whether person holding outlawed claim may be petitioning creditor.

[6] In re Lafferty, supra; In re Wooten, supra.

[7] In re Resler, supra.

[8] In re Currier (1912), 192 Fed. 695; In re Gibson (1902), 4 Ind. Terr. 498, 69 S. W. 974.

[9] In re Lipman, supra; In re Wooten, supra; In re Kingsley, supra.

[10] In re Lipman, supra.

Digitized by Google

preferences, is likewise avoided; because of the intention of Congress, inferred from the provisions of the act, "to annul all dispositions of the debtor's property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the scheme of the bankrupt act."[11] It would seem to be equally proper to hold that creditors who have enforceable and allowable claims should not be deprived of their pro rata share by the renewal of an outlawed claim, made by an insolvent in contemplation of bankruptcy, at least where the holder of the barred debt had reason to know of the insolvency; for the effect of such a renewal on the rights of the other creditors may be even more injurious than that of a voidable preference.

M. E. H.

BANKRUPTCY: EXEMPTIONS: AUTOMOBILE AS "CARRIAGE."—The California statute[1] declares to be exempt from execution: "Two horses, two oxen, or two mules, and their harnesses, and one cart or wagon, one dray or truck, one coupe, one hack or carriage, for two or more horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living."

In the case of *In re Wilder*,[2] a bankrupt hackman claimed as exempt under this section a taxicab automobile, but the claim was denied on the ground that the taxicab was not within the class of conveyances described by the statute.

Unquestionably the word "carriage," as ordinarily used, connotes a particular kind of vehicle, drawn by horses. But the word has also a broader signification, as meaning "a wheeled vehicle for carrying persons, in distinction from those used for transporting goods."[3] An automobile comes within the broader, but not within the narrower and more particular meaning of the word; and the courts have therefore held an automobile to be or not to be a "carriage," depending upon the connection in which the word is used. Thus, a right of way for carriages includes one for automobiles;[4] and the grant to a municipality of the right to license carriages is interpreted as conferring the right to license automobiles.[5] Other cases, while recognizing that in a broad sense an automobile is a carriage, refuse to apply to these "horseless carriages," criminal statutes, which are to be strictly construed,[6] or statutes imposing a liability for failure to keep roads in repair for use by carriages.[7]

---

[11] In re Gutwillig (1899), 92 Fed. 337.

[1] Cal. Code Civ. Proc. 690, sub. 6.

[2] (Mar. 4, 1915), 221 Fed. 476.

[3] Standard Dictionary.

[4] Diocese of Trenton v. Toman (1908), 74 N. J. Eq. 702, 70 Atl. 606.

[5] Commonwealth v. Hawkins (1905), 14 Pa. Dist. R. 592. See also Scranton v. Turnpike Co. (1909), Pa. St. 82, 73 Atl. 1063.

[6] Commonwealth v. Goldman (1910), 205 Mass. 400, 91 N. E. 392.

[7] Doherty v. Town of Ayer (1908), 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355. See also the earlier case

Digitized by Google

It would seem that the word "carriage," when used in a statute allowing exemptions, should be interpreted, if possible, in its broader sense, and should be held to include automobiles, as well as other means of conveyance. Such statutes are to be construed with extreme liberality, in view of the public policy which prompts their enactment.[8] The legislative intent in this case seems to have been to exempt the conveyance used by a hackman or other laborer, by which he earns his living. It may be that the words "for one or two horses" limit the meaning of "carriage," so as to exclude automobiles and justify the decision in the principal case. But it does not necessarily follow from the use of these words that it was intended to thereby limit the exemption to a vehicle propelled in a particular way. This was the view taken in a recent Iowa case,[9] where it was held that an automobile came within the provisions of a statute exempting a "team of not more than two horses or mules . . . . and the wagon or other vehicle, with the proper harness or tackle;" although the court took notice that ordinarily, at least, an automobile did not require a horse or harness to draw it. And it has been held that an automobile is a "carriage" within the meaning of the exemption laws of both Texas[10] and Oklahoma.[11] The decision under discussion can therefore be supported, if at all, only by the particular reference to "horses" contained in the California statute.

It is quite immaterial that the particular kind of vehicle was not in existence at the time the statute was passed, and that therefore the legislature could not have had the specific intent to exempt it. The courts had a similar problem to deal with when bicycles were introduced, and the question arose of the applicability to them of statutes enacted long before their existence. Beginning with Taylor v. Goodwin,[12] holding that a bicycle was a carriage within the meaning of an act declaring it to be a crime to drive a carriage furiously on a highway, they uniformly held that where the new device, under the usual rules of construction, came fairly within the class described by statute, it should be included therein.[13]

M. E. H.

---

of Baker v. Fall River (1904), 187 Mass. 53, 72 N. E. 336, where the contrary view is intimated by dictum.

[8] Holmes v. Marshall (1905), 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 69 L. R. A. 67.

[9] Lames v. Armstrong (1913), 162 Ia. 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691.

[10] Parker v. Sweet (Texas, 1910), 127 S. W. 881; Peevehouse v. Smith, (Texas, 1913), 152 S. W. 1196; Hammond v. Pickett (Texas, 1913), 158 S. W. 174.

[11] Patten v. Sturgeon (1914), 214 Fed. 65. See note, 3 Cal. Law Rev. 49.

[12] 4 Q. B. Div. 228.

[13] A bicycle is a vehicle within the Iowa statute considered in Lames v. Armstrong, supra. Roberts v. Parker (1902), 117 Iowa, 389, 90 N. W. 744, 57 L. R. A. 764, 94 Am. St. Rep. 316. Bicycle held a

Digitized by Google

EMPLOYERS' LIABILITY: SCOPE OF STATE AND FEDERAL ACTS.—The California courts in the case of *Smith v. The Industrial Accident Commission of the State of California*[1] were compelled to determine the applicability of the federal Employers' Liability Act[2] and the Workmen's Compensation Insurance and Safety Act of California.[3] The petitioner in that case was employed by the Southern Pacific Company as a special yard officer, part of his duties consisting in preventing trespassers from boarding trains. On the occasion in question he discovered three vagrants riding the "blind baggage" on an interstate train, and while pursuing them across the yard he was wounded by the accidental discharge of his revolver. The petitioner applied for compensation under the state act, but it was held: (1) that at the time of his injury he was engaged in work directly relating to interstate commerce; (2) that if he were entitled to compensation, it would be by virtue of the federal act, that act being supreme in its sphere. Both of these holdings seem correct.

Congress in the first employers' liability act[4] went beyond its field and encroached upon the preserves of the states. That act was held unconstitutional[5] because it was addressed to all common carriers engaged in interstate commerce, imposing a liability upon them in favor of any of their employees although both the carrier and the employee might have been at the time of the injury engaged in purely intrastate commerce. In the present act congress has proceeded with greater caution, and probably has not occupied the entire field allotted to it by the "commerce clause". The act is expressly limited to cases of injuries by carriers engaged in interstate commerce to employees while engaged in such commerce.[6] As the test is the character of the employment at the time of the injury, it is evident that with certain classes of employees, the nature of their occupation changes many times each day. Thus the yard policeman, as in the present case, drives trespassers from both "through" and "local" trains; yard clerks check the numbers of cars engaged in interstate as well as

---

carriage within meaning of statute granting toll right. Geiger v. Turnpike Road (1895), 167 Pa. St. 582, 31 Atl. 918. But see Murfin v. Detroit etc. Co. (1897), 113 Mich. 675, 71 N. W. 1108, 67 Am. St. Rep. 489. Bicycle not a "wagon" within Minnesota exemption statute. Shadewald v. Phillips (1898), 72 Minn. 520, 75 N. W. 717.

[1] (Feb. 16, 1915), 20 Cal. App. Dec. 284, 147 Pac. 600.

[2] (1908), 35 U. S. Stats. at L. 65; U. S. Comp. Stats. Supp. 1911, p. 1322, Fed. Stats. Ann. 1909 Supp. 584.

[3] 1913 Stats. Cal. 279.

[4] (1906), 34 U. S. Stats. at L. 232, U. S. Comp. Stats. Supp. 1907, p. 891, Fed. Stats. Ann. Supp. 1907, 68.

[5] The Employers' Liability Cases (1908), 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141.

[6] North Carolina R. R. Co. v. Zachary (1914), 232 U. S. 248, 34 Sup. Ct. Rep. 305.

Digitized by Google

intrastate transportation;[7] and switching crews handle both kinds of traffic.[8] In the case of Illinois Central Railroad Company v. Behrens[9] it was intimated that as there was such practical difficulty in separating the general work of a switching crew, the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by congress.

As to the second point in the instant case—that the federal act is paramount and exclusive in its sphere. Previous to the enactment of the federal act a number of states had passed statutes fixing the liability of employers for injuries to employees. These acts were uniformly declared valid by the courts,[10] though they applied alike to those engaged in interstate and intrastate commerce. Employers' liability, though directly connected with the regulation of interstate commerce, has been considered as one of those matters admitting of diversity of treatment according to the special requirements of local conditions, and not as a matter requiring a national and uniform system of regulation. The states may therefore act within their respective jurisdictions until congress sees fit to act. But when congress does act it overrides all conflicting legislation, and the laws of the states, in so far as they cover the same field, are superseded.[11] It is immaterial that the federal act was passed before the state act in California. Congress having spoken, the state act is limited as regards commerce to those occupations which are of an intrastate character.

E. J. S.

EVIDENCE: DEATH BY WRONGFUL ACT: MITIGATION OF DAMAGES.—At common law there was no right of action against a wrongdoer whose negligence caused the death of a person.[1] But in 1846 the increasing prevalence of accidents caused by the introduction of machinery brought about a change in public sentiment. The abhorrence of placing a money price on the life of a human being had long held back remedial legislation. The cold blooded attitude of wrongdoers illustrated in the statement that it is cheaper

---

[7] St. Louis, S. F. & Tex. Ry. Co. v. Seale (1913), 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651.

[8] Illinois Cent. Ry. Co. v. Behrens (1914), 233 U. S. 473, 34 Sup. Ct. Rep. 646. See also Pedersen v. Del., Lack. & West. R. R. Co. (1913), 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648.

[9] (1914), 233 U. S. 473, 34 Sup. Ct. Rep. 646.

[10] Missouri Pac. Ry. Co. v. Castle (1909), 172 Fed. 841.

[11] Erie R. R. Co. v. New York (1914), 233 U. S. 671, 34 Sup. Ct. Rep. 756; Chicago, R. I. and Pac. Ry. Co. v. Hardwick Farmers Elevator Co. (1913), 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. Rep. 174; Mondou v. N. Y., N. H. & H. R. R. Co. (Second Employers' Liability Cases) (1912), 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169.

[1] 21 Halsbury, Laws of England, 454; 1 Shearman & Redfield on Negligence, 6th ed., 321, §§ 124 ff.

Digitized by Google

to kill a man in an accident than to injure him and let him live, led in 1846 to the enactment in England of the Fatal Accidents Act, commonly known as Lord Campbell's Act.[2] A year later a similar law was passed in one of the United States[3] and since then other states have followed suit, the statute in California being now embodied in section 377 of the Code of Civil Procedure.

It is difficult to decide whether the ultimate purpose of such laws is purely compensatory or deterrent. That the pendulum has swung back and forth in California appears from the legislation and decisions. The first statute provided that "in every such action the jury may give such damages, pecuniary or exemplary, as they shall deem fair and just[4] . . . . . ", and the court held that exemplary damages could be given under the act.[5] A tendency toward making the action purely compensatory appeared when, in 1874, the section was amended to read "such damages may be given as under all the circumstances of the case, may be just",[6] and for a time there was a growing inclination on the part of the courts to emphasize this element.[7] But now, in *McLaughlin v. United Railroads of San Francisco*,[8] an action for death by wrongful act, the Supreme Court of California has held that evidence that the plaintiffs have come into ownership of property by reason of the decedent's death, is not admissible to mitigate the damages. The evidence sought to be introduced was the inventory and appraisement and decree of final distribution in decedent's estate. Her income had been $250 per month from a drug-store managed by herself and $85 per month from other investments. The court held that the evidence offered by the railroad was improper. "To say, 'True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better,' is to substitute the heir's legal right under the law for the company's liability."[9]

Though the courts in California have repeatedly held that the action is purely compensatory,[10] still it seems that this decision indicates a tendency unconsciously to emphasize the deterrent ele-

---

[2] 9 & 10 Vict. c. 93. See also note (1893), 27 Am. Law Rev. 257.
[3] New York, Laws of 1847, c. 450.
[4] 1862 Stats. Cal. 440, c. 330, § 3.
[5] Myers v. San Francisco (1871), 42 Cal. 215.
[6] Cal. Code Civ. Proc. § 377.
[7] Beeson v. Green Mountain G. M. Co. (1880), 57 Cal. 20; Munro v. Dredging etc. Co. (1890), 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Pepper v. Southern Pacific Co. (1895), 105 Cal. 389, 38 Pac. 974; Dyas v. Southern Pacific Co. (1903), 140 Cal. 296, 73 Pac. 972.
[8] (March 2, 1915), 49 Cal. Dec. 304, 147 Pac. 149, decision on rehearing affirming decision in bank (July 6, 1914), 48 Cal. Dec. 80.
[9] Stahler v. Philadelphia & R. Ry Co. (1901), 199 Pa. 383, 49 Atl. 273, 85 Am. St. Rep. 791.
[10] Munro v. Dredging, etc. Co. supra, note 7; Pepper v. Southern Pacific Co., supra, note 7.

Digitized by Google

ment. Had the latter been left entirely out of consideration, it is possible that a decision following the contrary English rule[11] might have resulted. Based chiefly on an early English nisi prius decision,[12] allowing the admission of an insurance payment in mitigation of damages, the Texas case of San Antonio and Aransas Pass Railway Company v. Long[13] stands practically alone as an American exponent of the English view. However, the passage of the act of Parliament[14] excluding evidence of insurance payments in mitigation of damages, the refusal of the Texas courts[15] to follow the Long case, the removal in many states of the restrictions as to maximum amounts to be recovered in such actions,[16] and the overwhelming weight of authority in the American courts in favor of the exclusion of such evidence,[17] all tend to show that both on principle and authority the decision in the principal case was just and proper.

G. H. G.

MORTGAGES: RIGHT TO WAIVE THE PROVISION OF SECTION 726 OF THE CODE OF CIVIL PROCEDURE.—Section 726 of the Code of Civil Procedure provides that there can be but one action on a debt or obligation secured by mortgage, which action must be brought as provided in the code.[1] Under this section it is held that the security cannot be waived and action be brought on the note, since the debtor is not personally liable until the security is exhausted.[2] Waiver of a part of the security or loss of the right to go against it by reason of the negligence of the mortgagee

---

[11] Blake v. Midland Ry. Co. (1852), 18 Q. B. 93, 118 Eng. Repr. 35.

[12] Hicks v. Newport, A. & H. Ry. Co. (1857), 4 B. & S. 397, note, 122 Eng. Repr. 508, 510.

[13] (1894), 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637. See Demarest v. Little (1885), 47 N. J. L. 28.

[14] Fatal Accidents (Damages) Act, 8 Edw. 7, c. 7, [1908] Stat. 8.

[15] Tyler Southeastern Ry. Co. v. Rasberry (1896), 13 Tex. Civ. App. 185, 34 S. W. 794; Gulf C. & S. F. Ry. v. Younger (1897), 90 Tex. 387, 38 S. W. 1121; Houston & T. C. Ry. Co. v. Lemair (1909), 55 Tex. Civ. App. 237, 119 S. W. 1162.

[16] Const. Penn. art. ii. § 21, in effect Jan. 1, 1874; Const. New York, art. ii, § 18, in effect Jan. 1, 1895. See 3 Shearman & Redfield on Negligence 6th ed., 2049, § 776.

[17] Illinois Central R. R. Co. v. Barron (1866), 5 Wall. (72 U. S.) 90; (insurance) N. Penn. R. R. Co. v. Kirk (1879), 90 Pa. St. 15; (pensions) Geary v. Metropolitan St. Ry. Co. (1902), 73 App. Div. 441, 77 N. Y. Supp. 54; St. Louis I. M. & S. Ry. v. Maddry (1893), 57 Ark. 306, 21 S. W. 472; (re-marriage of plaintiff) Wabash Ry. v. Gretzinger (Ind., 1914), 104 N. E. 69; Chicago & E. I. Ry. Co. v. Driscoll (1903), 207 Ill. 9, 69 N. E. 620. See also note 67 L. R. A. 87, 91.

[1] The section is based on § 246 of the Practice Act, as amended in 1865.

[2] Biddel v. Brizzolara (1883), 64 Cal. 354, 30 Pac. 609. But the section does not apply to debts secured by pledge, Ehrlich v. Ewald (1884), 66 Cal. 97, 4 Pac. 1062; Jones v. Evans (1907), 6 Cal. App. 88, 91 Pac. 532.

Digitized by Google

destroys the right to a deficiency judgment,[3] and release of portions of the security without the consent of the debtor releases him from liability to the extent to which the deficiency is increased.[4] No counterclaim, set-off or lien may be asserted on a debt secured by mortgage.[5] If an action is brought on the debt in another state the right to foreclose on the security in California is lost.[6] But the section is in derogation of the freedom of contract and is not to be extended beyond the obvious import of its terms.[7] Therefore an action may be maintained in California for a deficiency where the mortgage was foreclosed in another state, since a personal judgment for the deficiency could not be given in that suit if the debtor was without the jurisdiction.[8] If the debtor has no title to the mortgaged property, action may be brought on the debt without going through the empty formality of foreclosure;[9] but if the mortgage on its face was "security" for the debt, and the debtor has a right to encumber it there must be foreclosure regardless of the value of the property, even though prior mortgages amount to more than the market value of the property.[10] The parties may stipulate for sale of the premises in specified lots,[11] and part of the security may be waived so long as a deficiency judgment is not sought.[12] Nor need there be foreclosure to hold persons collaterally liable on the debt, as indorsers of the mortgage note.[13] Attention was called in a recent issue of this Review to the fact that an action of unlawful detainer or other auxiliary remedy to secure possession of the property, where allowed by law or by the contract of the parties, is not the "one action" allowed by the code, and is no bar to foreclosure.[14] In

---

[3] Hibernia Sav. & Loan Soc. v. Thornton (1895), 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52. But if the lien is lost without the fault of the mortgagee he can bring action on the debt, Savings Bank v. Central Market Co. (1898), 122 Cal. 28, 54 Pac. 273.

[4] Woodward v. Brown (1897), 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

[5] McKean v. German-American Sav. Bank (1897), 118 Cal. 334, 50 Pac. 656.

[6] Ould v. Stoddard (1880), 54 Cal. 613.

[7] Merced Bank v. Casaccia (1894), 103 Cal. 641, 37 Pac. 648.

[8] Felton v. West (1894), 102 Cal. 266, 36 Pac. 676. See also Blumberg v. Birch (1893), 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67, where an action on the deficiency was allowed against a mortgagor who was a non-resident at the time of foreclosure and consequently was not personally bound by service by publication, although the foreclosure suit was in this state.

[9] Otto v. Long (1900), 127 Cal. 471, 59 Pac. 895.

[10] Barbieri v. Ramelli (1890), 84 Cal. 154, 23 Pac. 1086.

[11] Humboldt Sav. Bank v. McCleverty (1911), 161 Cal. 285, 119 Pac. 82; Bank of Sonoma Co. v. Charles (1890), 86 Cal. 322, 24 Pac. 1019.

[12] Bull v. Coe (1888), 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

[13] Carver v. Steele (1897), 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156; Kinsel v. Ballou (1907), 151 Cal. 754, 91 Pac. 620; Vandewater v. McRae (1865), 27 Cal. 596.

[14] 3 Cal. Law Rev. 173. See also Ashcroft Estate Co. v. Nelson

Digitized by Google

Careaga v. Becker[15] this doctrine was extended to permit foreclosure of mechanic's liens though the claims were among those secured by a mortgage given by the contractor to the materialman. In *Post v. Becker*[16] it was held that the mortgage could be foreclosed so long as the claims on which lien actions were pending were not included in the foreclosure.

The later cases seem to manifest a more liberal view than was shown in the earlier decisions construing the statute. Indeed in the Careaga case it was said that the section was inapplicable except in an action involving the debt directly secured by the mortgage, and furthermore that it existed merely for the protection of the principal debtor and could be waived by him. It seems to have been tacitly assumed by the profession that this section, like the equity of redemption, was founded on public policy and could not be waived by the parties. None of the mortgage forms in general use appear to contain such a waiver, though otherwise very favorable to the mortgagee. The cases that have discussed the matter heretofore have merely said that the section was passed to relieve the principal debtor from the harassment of numerous actions when one would be sufficient, and to make the mortgaged property the fund primarily liable for the debt.[17] It would appear then that the section merely states a method to be followed in the absence of agreement to the contrary. Indeed, its provisions may to some extent be avoided by use of the trust deed, or mortgage with power of sale, forms of security. It does not seem to be founded any deeper in public policy than the statute of limitations, homestead or execution exemptions, all of which may be waived, at least in part, or by complying with certain formalities. The effect of the dictum in the principal case will probably be to cause the addition of a waiver of section 726 to many mortgages hereafter drawn in this state.

J. S. M., Jr.

WATER LAW: IRRIGATION DISTRICTS: RIGHTS OF PROSPECTIVE CONSUMERS.—The increasing importance of irrigation and the creation of numerous large and important enterprises for the purpose of distributing water to the public have given rise to a multiplicity of novel questions involving the respective rights of the water users as between themselves and also with

---

(Jan. 25, 1915), 20 Cal. App. Dec. 146. Rehearing denied by Supreme Court March 26, 1915.

[15] (Feb. 11, 1915), 49 Cal. Dec. 142, 146 Pac. 665.

[16] (Jan. 23, 1915), 20 Cal. App. Dec. 142, 147 Pac. 98.

[17] Ould v. Stoddard, supra, n. 6; Toby v. Oregon Pac. R. R. Co. (1893), 98 Cal. 490, 33 Pac. 550; Commercial Bank v. Kershner (1898), 120 Cal. 495, 52 Pac. 848; Hellyer v. Baldwin (1890), 53 N. J. L. 141, 20 Atl. 1080; Winters v. Hub Min. Co. (1893), 57 Fed. 287.

Digitized by Google

relation to the distributing companies and the regulation of the latter as public service corporations. An entirely new branch of law is being developed, and the Supreme Court of California has played an important part in determining many of these original problems. The decision in *Byington v. Sacramento Valley West Side Canal Company*[1] presents some of these interesting propositions.

The plaintiffs were the owners of irrigable lands within the boundaries of the Central Irrigation District, which had been organized and started under the Wright Act, had gone through various vicissitudes during the period of litigation involving the constitutionality of that act, and, like most of the districts commenced under that act, was unable to consummate the object of its organization.[2] The defendants had succeeded to whatever rights remained in the *de facto* district, (for the proceedings leading up to the organization of the district had been held void)[3] and were extending their canals toward the lands owned by the plaintiffs. They were, however, also preparing to irrigate lands outside of the primary territory originally embraced within the district and were adopting the policy of purchasing lands inside the district and selling such lands with a preferential water right to the exclusion of lands held by other private owners. It was to safeguard their incipient right to such water that these private owners invoked the protection of the court and asked it to quiet their title and claim to the prospective use of the water and to forestall the creation of adverse claims in the meantime. The court held that this injunctive relief was appropriate even though the plaintiffs were not so situated as to be in a position to take water until the main canal had been extended to the vicinity of their lands. Cases were cited when such protection was given as between distinct individual appropriators and users,[4] and the right of prospective water users within the limits of an irrigation district to be served with water from the system, when available, was held to be equally entitled to protection from outside consumers, and also as against any discrimination or attempt on the part of the distributing company to convey a preferential right to a special class of landowners within the district.[5] In this respect the California courts do

---

[1] (April 29, 1915), 49 Cal. Dec. 633, 148 Pac. 790.

[2] For an interesting account of this period see Chandler, Elements of Western Water Law, 136-7; Wiel, Water Rights, 3d ed., §§ 1356-1358.

[3] In re Central Irrigation District (1897), 117 Cal. 382, 49 Pac. 354.

[4] Inyo Cons. Water Co. v. Jess (1911), 161 Cal. 516, 520, 119 Pac. 934; Merritt v. City of Los Angeles (1912), 162 Cal. 47, 50, 120 Pac. 1064.

[5] Following Leavitt v. Lassen Irrigation Co. (1909), 157 Cal. 82, 89, 106 Pac. 404; see also Wiel, Water Rights, §§ 1283-1284.

Digitized by Google

not consider the consumer as an appropriator, and hence legitimate consumers cannot acquire preferential rights as between themselves, while in some of the semi-arid states where the consumer is regarded as an appropriator, priorities and preferences are permitted.[6]

W. E. C.

---

[6] See article, Wiel, Water Titles of Corporations and their Consumers, 2 Cal. Law Rev. 273, 2 id. 511.

Digitized by Google

Book Reviews

A TREATISE ON THE LAW OF CARRIERS. By Dewitt C. Moore. Matthew Bender & Co., 511-513 Broadway, Albany, New York 1914. Vol. 1, pp. cclxxxii, 580; vol. 2, pp. ix, 1448; vol. 3, pp. vii, 2444. $19.50.

The recent development of the Law of Carriers has been disconcertingly rapid, and there has been need of a text-writer who would collect and effectively organize the late decisions. This duty has been performed in thorough-going fashion by Mr. Dewitt C. Moore of the Johnstown, New York, Bar, in the second edition of his work on Carriers, and it may be said, without fulsome eulogy, that the resulting treatise is without a superior in its immediate field.

The text of the work is singularly compact. There is gratifying freedom from the "padding" which mars the product of so many latter day legal writers. We cannot doubt the entire truth of the author's prefatory statement that "it has taken more time and labor to abridge these pages than to write them." The studied process of condensation has yielded an enormous gain in working efficiency which none can fail to appreciate to the full.

The annotations are copious, embracing all the recent cases. This feature of the work bears evidence of exhaustive as well as intelligent effort. No statement of principle is allowed to rest upon the author's fiat—a veritable wealth of citation is marshalled immediately in support. The controlling law is made readily available, even to him who runs as he reads.

A substantial portion of volume three is devoted to the Act to Regulate Commerce and cognate statutes. The Act is prefaced by a brief preliminary chapter dealing with the commerce clause of the Constitution in its relation to transportation. This innovation is especially to be commended. It serves to delimit, albeit in the briefest compass, the fields respectively occupied by the state and federal authorities in the world of commerce. While not within the scope of a treatise on carriers, technically speaking, it effectively restricts the treatment of the Act to its proper sphere.

No doubt can be entertained that a conscientious effort has been made to cover this immediate branch of the subject as thoroughly as any other, but there is an obvious lack of the firm grasp which characterizes the treatment of other topics. Casual errors in the citations likewise begin to appear. It is somewhat embarrassing, for example, to find the case of Lundquist v. Grand Trunk Western Railway Company, 121 Fed. 915, cited as established law (vol. 3, p. 1789), despite the fact that it was squarely overruled by the United States Su-

Digitized by Google

preme Court in Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad Co., 220 U. S. 235. This latter decision is, of course, duly cited (vol. 3, p. 1810), but the clash with the Lindquist case seems not to have been suspected. Similarly, there has been a failure to note certain changes in the law produced by recent amendments to the Act—a fault which is readily to be pardoned. These defects are, presumably, chargeable to inaccurate revision of the text of the first edition.

It is impossible to avoid a sense of regret that extensive portions of the general text consist of conjoined statements of principle snatched almost verbatim from the lips of the courts. The practice is common and perhaps not easy to avoid. It makes for exactness, but detracts substantially from style and effect. The legal writing which endures must be essentially that of the author himself; he must make his own the principles which are found in the decisions of the courts and then give them independent expression. To the extent that the author here has followed a different course he has failed to attain the most satisfying results.

But a work of merit cannot be criticised with comfort. It is enough that its shortcomings are unimportant and that its virtues are most marked. Moore on Carriers is assured an honorable position among legal treatises.

A. P. M.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Vol. XXVI. Year Books of Edward II. Vol. VI. 4 Edward II. A. D. 1310-1311. Edited by G. J. Turner, of Lincoln Inn, Barrister-at-Law. Bernard Quaritch, 11 Grafton St. New Bond St., London, W. England. 1914. pp, civ, 228. £1, 8s.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXX. Select Bills in Eyre, A. D. 1292-1333. Edited by William Craddock Bolland. Bernard Quaritch, 11 Grafton St., New Bond St., London, W., England. 1914. pp. lxiii, 198. £1, 8s.

The first mentioned of these two publications will perhaps prove the more interesting to the student of law, the second, to the student of social and economic conditions and of general history. But both of them are replete with interest to many sorts of men, and cast light upon many problems of the most vital interest at the present day.

For example, are the rich getting richer and the poor poorer, or is the contrary the fact? In the thirteenth century we find from the Bills in Eyre that oxen are valued as low as six shillings apiece, a mare at seven shillings, a "hackney" at twelve pence. But notwithstanding these valuations taken from bills in this collection, the high cost of living was apparently not a thing unknown to the subjects of the first three Edwards. Oats and wheat are valued at from two to five shillings a quarter. The very cheapness

Digitized by Google

of livestock compared with the relative dearness of wheat tends to show that Englishmen in the thirteenth and fourteenth centuries were worse off than they are today. And our conclusion is fortified by what we read in the pages of these Select Bills of the insecurity of life, limb and property in these good old days.

One sample, taken almost at random from these bills, we quote as typical of the kind of complaints and the form of pleading. It is from the Shropshire Eyre of 20 Edward I. "Dear sir, I cry mercy of you who are put in the place of our lord the King to do right to poor and to rich. I, John Ferewyn, make my complaint to God and to you, Sir Justice, that Richard the carpenter, that is a clerk of the bailiff of Shrewsbury, detaineth from me six marks which I paid him upon receiving from him an undertaking in writing wherein he bound himself to find me in board and lodging in return for the money he had from me; and he keepeth not what was agreed between us, but as soon as he had gotten hold of the money he abandoned me and constrained my person and gave me a scrap of bread as though I had been but a pauper begging my bread for God's sake, and I was nigh to dying of hunger through him. And for all this I cry you mercy, dear Sir, and pray, for God's sake that you will see that I get my money back before you leave this town, or else never shall I have it back again, for I tell you that the rich folk all back each other up to keep the poor folk in this town from getting their rights. As soon, my lord, as I get my money I will go to the Holy Land, and there I will pray for the King of England and for you especially, Sir John of Berewick; for I tell you that I have not a half penny to spend on a pleader; and so for this, dear Sir, be gracious unto me that I may get my money back. (Endorsement.) The defendant admitteth the agreement and breach and the parties come to an agreement by leave of the Court." We are glad that the plaintiff got some relief, notwithstanding the rich were all leagued against him. We fancy, notwithstanding plaintiff's plea of poverty, some pleader got more than a half penny for this eloquent pleading, which, by the way, was written in French, the language of the courts and pleaders. But of this we can never be certain, nor whether poor John Ferewyn went to the Holy Land with the six marks or a substantial part thereof.

The Year Books give us as intimate a picture of the courts at Westminster as the Bills in Eyre of the life of the country. Blackstone, following Plowden and Coke thought they were official reports; later investigators, among them Maitland, incline to the view that they are not the work of official reporters. In his preface to this volume of the Year Books, Mr. Turner suggests reasons for the belief that while the earliest of the manuscripts were not the work of official reporters, such reporters were later appointed and some of the reports of the later period are their work. Some of the cases in this volume we should

Digitized by Google

think were the work of private reporters. At page 156, a decision of Bereford is said to have "seemed strange to some," and on page 26, the reporter says "Afterwards I asked Passeley, (counsel), for the reason for Stanton's statement, and he said that the judge had some reason of his own." We can hardly imagine an official reporter making such comments.

But whether official or not, the value and interest of these documents remain the same. There is a sense of reality about these cases that we miss in the cut and dried modern reports. How natural is Chief Justice Bereford's exclamation, in a puzzling case, "Ill luck on your covenants," (page 10), or Stanton's "Well it is for me that you are agreed, and by your agreement is the court spared much trouble, for in justice, John, though good faith is on your side, the law of the land would have served you nought. And do you, John, when you lease your lands again, put all your covenants in one writing," (page 91). At page 132, counsel begins to state his demand, "and afterwards Stanton, J., winked at him." The judges frequently back their opinions with bets. "I will wager a cask of wine on it," (page 44), or "if he recover that moiety against you in this way, I will give you as much of my own land," (page 53), or "If you find it (an authority referred to by counsel) I will give you my hood (jeo vous dorra mon chaperon)," (page 168). Counsel come in for many hard knocks. A judge shows how a former case should have been pleaded, "Sire, you speak the truth; the case was not well managed" (page 83). In another case counsel is warned: "You went too far here once before," (page 43), and once, Bereford, C. J. enraged said: "Do you think, John Hengham, to embarrass the court in this plea as you embarrassed it in the case of Christian the widow of John le Chalunner? By Saint James! you will not do so (Par seint Jake vous noun friez)," (page 169).

That there were tricky lawyers in those days as in these, witness the case of Chaumberlyn v. Combes at page 20. A default had been taken, and the defendant's lawyer seeks to set it aside on the ground that he was arrested by the bailiffs of a certain town as he came through. Unfortunately he is confronted with the record in another case which recites his presence at Westminster on the very day on which he says he was arrested. He protests that this entry is a fraud, but without success. He can not thus impugn a judgment. Bereford says: "All England cannot save this default."

The case at page 48 helps to explain why the judges of the courts of common law regarded themselves as umpires, rather than as judges administering a system of justice,—a theory that is fundamental in the English common law and has been carried over into our own. The writs were purchased and issued under the great seal, after having been examined in the chancery

Digitized by Google

by examiners. If the judges permitted writs to be amended freely, they would be depriving the king's treasury of legitimate revenue. "If the examiners had found this defect," says Stanton, J., "would they have passed the writ for the seal? Scrope, (counsel) No, sir. Stanton, J., And why should we uphold it?" At page 163, the court lays down the umpire theory with great positiveness. Counsel asks the opinion of the court as to how he should proceed. The judge answers: "By the faith which I owe, you will not have judgment from us upon what point you should take your stand, but do you yourselves consider on what you will do."

We have noted the following points of more or less general interest decided and discussed in these reports: Judicial notice not taken of the age of a person in court, (page 19), attempt to prove conveyance of reversion without deed, (page 32), husband and wife treated as joint tenants, (page 41), suit for debt in ecclesiastical courts abated (page 97), progress in women's rights, (page 122), mediaeval bookkeeping (pages 127, 136, 154), executor suing himself personally (page 150).

A matter of interest of a different kind that may be mentioned for what it is worth is the fact that the forty-sixth case in the roll is entitled Bardolf v. Bardolf, the fiftieth case Pecham v. Poynz. It may be only an accidental coincidence that the author of Henry IV also used these same names in close connection, but is it not possible that the quick eye of the dramatist had seized upon these peculiar names in one of the manuscripts of this roll, and fitted them to the characters?

Membership in the Selden Society costs one guinea a year, entitling the member to its publications. Its printed list shows but two members in the State of California. At least all the larger public libraries should be members.

O. K. M.

THE ILLEGALITY OF THE TRIAL OF JESUS. By Honorable John E. Richards. THE LEGALITY OF THE TRIAL OF JESUS. By S. Srinivasa Aiyar. A. L. Chatterton, 354 Fourth Ave., N. Y. 1914. pp. 92. $2.00.

Nothing is more difficult, certainly, than to keep the even balance of judicial opinion when dealing with subjects closely connected with the life of the founder of our faith. One instinctively becomes the advocate.

Judge Richards brings to his treatment of the trial of Jesus the training of a lawyer combined with deep religious feeling. We follow his pages with sympathy, and yet with the feeling that considerations of religious fervor have mingled with a scientific interest. Justice Aiyar is respectful, but evidently unembarrassed by any bias in favor of Christianity. His argument discloses the characteristics of the eastern mind. There is no clear cut analysis, and the effort to grasp it as a whole

Digitized by Google

results in illuminating touches, intermingled with irrelevant matter. To us such a manner is tantalizing and seemingly superficial.

This subject has attracted the attention of many lawyers, as well as theologians and New Testament scholars. Aside from its religious interest, the trial of Jesus has a certain fascination. The incidents connected with it are dramatic and the characters are clearly portrayed in the picture which the record presents.

Both these essayists give much importance to the trial before the Sanhedrin, but the hearing before this ecclesiastical court seems to have been little better than a farcical examination. Prior to the Roman domination, this great court had a national character as the first court of appeal for all questions connected with Mosaic law, and also enjoyed a considerable amount of criminal jurisdiction. But Schürer tells us that from the time Judea became a Roman province the *jus gladii* had been taken away from the Jews. It would be a mistake to suppose that the Romans left the provincial court anything but the forms. All real power was taken away, and the high officials recognized this to be so.

The removal of the cause from the Sanhedrin to the court of the procurator was not in the nature of an appeal, for Pilate threw out, not only the verdict, but the charges on which it was based,—blasphemy and the threat to overthrow the temple. When Jesus was brought before the procurator the trial began *de novo*. The former judges became the accusers, and a new charge of high treason against Caesar was substituted.

Doubtless the anxiety of the Jewish officials to bring Jesus before their own court was to maintain the legal forms according to the ancient code, but in this they did not fully succeed. As Judge Richards points out, the trial had its inception in illegality because of the effort to take Jesus secretly, and the arrest of Jesus was accomplished at night, while under the Jewish law no step in such a cause could be taken at night. So that in point of form even, the sentence of the Jewish court was not strictly legal. Justice Aiyar, on the other hand, quotes Professor Greenleaf to the effect that "if we regard Jesus simply as a Jewish citizen, and with no higher character, his conviction seems substantially right in point of law . . . . . It is not easy to perceive on what ground his conduct could have been defended before any tribunal unless you thought of his superhuman character."

The question, however, centers on the legality of the trial before Pilate. Our reports give us a picture of turbulence. An angry mob insisted on crucifixion, and cried out: "If thou let this man go thou art not a friend of Caesar." Pilate sat not so much as a judge, as an executive, and after attempting the subterfuge of sending Jesus to Herod, finally yielded to their clamor.

Digitized by Google

Where the life of a Roman citizen was not at stake, the elaborate system of the Romans for the conduct of trials was not always followed, and in the more tumultuous provinces, like Judea, the governor was left largely to his own discretion. We can hardly say, therefore, that it was illegal for Pilate to order Jesus to be crucified.

W. W. B.

THE JUVENILE COURT AND THE COMMUNITY. By Thomas D. Eliot. The Macmillan Co., 66 Fifth Ave., N. Y. 1914. pp. xv, 234. $1.25 net.

This volume shows, on the part of the author, a careful and intelligent study of Juvenile Court conditions throughout the United States. In fact that part of the book which deals definitely with conditions as they exist in the different localities is particularly instructive to one desirous of gaining some knowledge of the position of the Juvenile Court in the different cities of this country.

The author, however, intends the book as somewhat more than a survey. In it he puts forward his definite conception of the relation to the community of the Juvenile Court and the work that it is now doing. It is his thesis that the Juvenile Court while it has done a very important work should hold as an ideal its own self-effacement. The process to this end is indicated clearly and in such a fashion as not to necessitate special knowledge. The argument runs somewhat as follows. There is prevalent at present a somewhat general criticism of the Juvenile Court both from within and without. This is caused by the fact that the eventual structure will be something different and more thorough-going than the Juvenile Court. For the problem of the abnormal child is ultimately not a judicial problem. It is rather an educational one. By educational the author intends to include the work of the probation officer, the parental and correction schools, the playgrounds, the diagnosing and prognosing clinic, the employment bureau, as well as the usual educational instrumentalities. Though some of these instrumentalities are not in their normal use strictly educational, still in the author's opinion they should be allied to and used as a part of it when effort is being made to bring a child into a normal relationship with the community. He considers the work of the probation officer chiefly that of establishing "constructive friendship" which is really an educational work. Also he considers as particularly an educational work that of the friendly visitor. He admits freely that the Juvenile Court must continue in existence for a number of years and must occasionally do those odd jobs which are not really judicial whenever there is no other efficient agency to take care of the work. However,

Digitized by Google

it is his contention that whenever a child comes to the Juvenile Court it is only because some social agency has failed in its work of keeping the child up to the normal and the Juvenile Court is called upon as first aid.

He contends that the Juvenile Court should bend its energies towards obtaining greater efficiency from social agencies when they exist and to demonstrating the need for them where they are lacking. As much work as possible should be done by the social agencies and as little by the court. The court should be the place to come for final decisions as to plans and authority. But having decided, the administration should be with the schools and social agencies. For the essential business of a court is "to adjudicate disputed rights". Also the exercise of too many functions detracts from efficiency.

Incidentally the author expresses his opinion that the work of volunteers, though sometimes indispensable, is not very successful and should always be under the control of paid officers; that the police department in general is too active in making needless arrests; that the training, practice and work of the policeman rather tends to unfit him for the work of a probation officer; that the probation officer is a "social surgeon" and should be the "focal" or vital part of the child caring system and must focus all social forces of the neighborhood on his cases. The court also is to assist in bringing about this increased effort of the neighborhood.

That the class of children whose only fault is destitution, should in the author's opinion be taken entirely out of the Court's jurisdiction unless a question of authority or custody should arise. It is only the exceptional case that should ever come before the court for commitment. Neither should children be brought before the court where the parents are willing voluntarily to accept assistance and direction. The court should only step in to enforce "modalization" where its authority becomes necessary. To this extent the court is a necessary background to the Child Caring System. But the court should be a Court of Domestic Relations and not a Juvenile Court. The parent, as the best point of contact to exert social pressure, should be held accountable and not the child. Further the child cannot obtain adequate help unless control is had of the family. For in any social work the family is the unit of treatment and so we are having the gradual extension of the school system to the family as a whole.

In conclusion the author prophesies the gradual breaking up of the Juvenile Court as its work is from time to time taken over by the school and the Court of Domestic Relations.

C. DeY. E.

Digitized by Google

CONCISE LAW DICTIONARY. By Frederic J. Stimson. Little, Brown & Co., 34 Beacon St., Boston, Mass. 1911. pp. 344. $3.00.

This is an improved edition of an excellent book. In its present form it accomplishes as nearly as can be its purpose of briefly, completely and accurately presenting to the student and reader the meaning of all the law terms that he may encounter. This is no easy task, but subjected to the considerable test which we have given it, the problem seems to have been successfully solved.

The way in which the word "court" is treated is an admirable illustration of both the scholarly and the practical character of the book. After giving a concise definition and a reference to Blackstone's Commentaries, the article gives what appears to be a complete enumeration of British and American courts. Each court as mentioned, the "Exchequer," for example, has its origin, history and jurisdiction clearly and simply stated. This one article of itself makes the work a valuable handbook for the student.

Altogether it is an admirable law dictionary, and for the quick reference which is usually desired of a dictionary, it fully meets one's wants. It is furthermore of convenient size and easily consulted, while other books are being read.

W. C. J.

Books Received

LAW OF SALES OF STOCKS AND BONDS. By Milford J. Thompson. T. H. Flood and Co., 214 W. Madison St., Chicago. 1915. pp. xxv, 208. $3.00 del'd.

THE DOCTRINE OF INTERVENTION. By Henry G. Hodges. The Banner Press, Princeton, N. J. 1915. pp. xii, 288. $1.50 net.

THE ENFORCEMENT OF DECREES IN EQUITY. By Chas. A. Huston. Harvard University Press. 1915. pp. xxi, 183.

A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, CONTAINING THE STATUTES AND JUDICIAL DECISIONS 1904-1914. By John Henry Wigmore. Little, Brown & Company, Boston. 1915. pp. xlv, 935. $6.50 net.

Digitized by Google

California Law Review

Volume III. SEPTEMBER, 1915 Number 6

Changing Conceptions of Law and of Legal Institutions

THE greatest of modern poets and literary men, himself a lawyer and practical statesman, in the first part of Faust, expresses his conception of law in a dialogue between Mephistopheles and a student, in the following words:

STUDENT.

"I cannot reconcile myself to Jurisprudence.

MEPHISTOPHELES.

Nor can I greatly blame you students,
I know what science this has come to be,
All rights and laws are still transmitted
Like an eternal sickness of the race.
From generation unto generation fitted,
And shifted round from place to place.
Reason becomes a sham, beneficence a worry:
Thou art a grandchild, therefore woe to thee!
The right born with us, ours in verity,
This to consider, there's alas! no hurry."

From what Goethe tells us in his autobiographical sketch entitled "Truth and Fiction," his experience as a student of the law at Strassburg justified his characterization of the legal learning of his day and country. Law was conceived of by the practitioners and jurists of his time and nation as a system of rules to be memorized for practical use, with little appeal to reason, with no recourse to other fields of learning in the search for fructifying principles. So conceived, law may well be compared to "an eternal sickness of the race;" it is certainly not a subject worthy of the best powers of any self-respecting intellect, much less of a

*Address before the annual meeting of the California Bar Association, August 24, 1915.

Digitized by Google

master mind such as Goethe's. A theory of law which regards it as a sort of semi-inspired revelation contained in certain sacred books and not to be found outside of the covers of these books, which rejects reason and common sense in a blind worship of authority, which regards the rules of law as ends in themselves and not rather as means to the realization of justice, must fail of respect in our practical modern world.

There have been times in the world's history when law was so regarded. Professor Carlo Calisse, of the University of Pisa, in his "History of Italian Law," a portion of which has recently been translated and forms a part of the work entitled "A General Survey of Continental Legal History" in the Continental Legal History Series, published under the auspices of the Association of American Law Schools, has described the degeneration of the Roman law in the hands of the Italian lawyers of the twelfth and thirteenth centuries who succeeded the great restorers of the legal system, Irnerius, and Accursius. Professor Calisse writes:[1]

> "The outward signs of a decadence were not long in appearing. Lectures and treatises alike became so prolix that only a small topic could be treated in them. Seeking to avoid this dilemma, they confined their discourses to the easier topics, omitting those difficult ones which required too much time. The judgment of Cujas upon them, in after times, is full of truth: *'Verbosi in re facili, in difficili muti, in angusta diffusi.'* They totally lacked literary culture; their style was common-place and their diction crude and harsh. . . . . None of the other branches of learning were made use of. And the inherence of these traits in the very method itself is apparent when we find Cino of Pistoia, an accomplished poet, using in his law books a style as crude as that of any other jurist; or when we hear Baldus, one of the foremost jurists, advising the students to pay no attention to style or form of utterance . . . . Legal science was now a victim to the fetish of authority worship. The lecture, the forensic argument, the judicial decision, now consisted in little more than citing somebody's name and treatise . . . . Dogma and authority worship having superseded reason and science, it was now an easy step to the logical culmination of the system—the doctrine of *"communis opinio"* or weight of opinion; i. e. the rule that the recorded opinion which had the greater number of adherents was the sound one. To this rule the practitioners were ready enough to yield support;

---

[1] A General Survey of Events, Sources, Persons and Movements in Continental Legal History, 143-4.

Digitized by Google

> for it reduced their labor to that of ransacking from the books as many opinions as possible, regardless of their intrinsic value, and then marshalling them in court, like hostile battalions, for the judges' mechanical enumeration. And the schools of law, which still had their eyes entirely on the preparation of practitioners, followed suit; they contented themselves with the same dull round of repetitious citation of musty authorities, whose chief virtue was that their opinions were at least likely to be better than those of the lecturers of that day. . . . . The story of the classic Roman law had offered an interesting parallel to this stage of legal science. There, too, when the produce of juristic thought had passed its prolific and brilliant stage, the solution of legal doubts was sought by the mere rule of thumb. By the law of citations the judge was to decide, not by aid of his own reasoning, but by following that opinion which numbered a majority of accredited names, and when the number was equal, Papinian's name controlled. There, too, it was a period of decadence; and the same effects are seen, a thousand years apart, recurring from the same causes. And," continues the learned modern Italian jurist whose words I quote, "herein is contained a lesson, by no means flattering, for us of today, when the same tendency is once more visible, to subordinate the living, active reason of the law to the mechanical counting of precedents."

The theory illustrated by the strange system of the medieval commentators and by the Roman law of citations is, of course, that there is a law existing in books which can be extracted from them by a mechanical process, without any serious intellectual exertion, other than the expenditure of considerable clerical labor. The painter of the early Renaissance who saw no anachronism in depicting Hector or Achilles in a suit of Florentine armor, was paralleled by the lawyer who found in the comments of Accursius upon the text of the Digest an authority greater than the original. The age that found its science completely stated for it by Aristotle and regarded whatever was not to be found in his pages as heresy, an age that conceived of Vergil not alone as a poet but as a prophet from whose pages one could learn one's future, might find nothing shocking in a conception of law that removed it wholly from the field of human interest and put it in the field of revelation. It is true that the great spirits in the new culture, Dante, Petrarch, and Boccaccio, saw the absurdity of this view as to the nature of law and criticized it with the same vigor as did Goethe at a later date. But it required the full daylight of the new humanism to banish the legal darkness of the now for-

Digitized by Google

gotten commentators. Literature and science were already well advanced before the so-called humanists in the fifteenth and sixteenth centuries succeeded in introducing into the method of jurisprudence the scholarship that had already done so much for other branches of learning,—the study of original sources, of the texts rather than the comments, in other words, the method of history.

What happened in the development of the Roman law and in that of modern continental Europe finds something of an analogy in the story of our own system. There have been periods in the history of the English law when it seemed likely to degenerate into formula worship, and our own Justice Holmes recently told us that "to rest upon a formula is a slumber that, prolonged, means death."[2] We need go no farther back in the history of English law than the early part of the reign of Queen Victoria to find illustration of the blind worship of form and precedent. A very great and learned judge, one of the most learned and subtle men that ever sat upon the bench, was James Parke, Baron of the Exchequer, later Lord Wensleydale of the House of Lords, known to his contemporaries and to history by the nickname of "Baron Surrebutter." In the case of Regina v. Reed,[3] the defendant was charged with larceny for stealing coal from his employer. He had gone to the coal bunkers with his master's cart and then got coal for his employer, which he wrongfully sold to a third person and pocketed the proceeds. The majority of the court thought that by the placing of the coal in the master's cart, it was in the constructive possession of the latter, and therefore, Reed committed larceny when he took it, though if he had carried off the coal from the bunkers on his back he would not have been guilty. The report shows that Baron Parke, who was, when precedent was not involved, one of the hardest-headed and most logical of men, took no stock in so fine a distinction, when the case was argued. However, in the delivery of the opinion he concurred with the rest of the court upon the authority of a former case, Spears' case. He said:

> "I certainly had differed from the view of this case which has been taken by Lord Campbell at a time when it was uncertain what the case of Spears' actually was, and treating this

[2] Ideals and Doubts, 10 Illinois Law Review, 1.

[3] (1853), 6 Cox C. C. 284. Baron Parke's theory as to the binding effect of unreported cases is the prevailing English view; Pollock, Essays in Jurisprudence and Ethics, 244.

Digitized by Google

> case as res nova. The book in which the opinions of the judges are written, and which is always in the custody of the Lord Chief Justice, was mislaid; and the case of John Spears was differently reported in the two editions of Leach, and also in East's Crown Law; and that case could not for a long time be found. However, since it has been found, I have satisfied myself, and I entertain no doubt upon it. I should have delivered my reasons at length; but it is unnecessary now to do so. The cases of Rex v. Abrahat and Rex v. Spears having been discovered, and having read that case with the explanation of Heath, J., I find the point decided; and though, therefore, if this were res nova, I should have pronounced an opinion that this was not larceny, yet as that case is a decided authority, by the authority of that case I am bound; and it is unnecessary for me to deliver my reasons at any greater length."

Think of the liberty or property of a man depending upon the accident whether or not the "Black Book," containing the manuscript decisions of the judges, could be found! The principle of *stare decisis* is one of the greatest importance for the welfare of society; if we did not have such a principle in our system we should be tossed upon a sea of uncertainty and doubt without a compass and without a chart. But the true basis of the doctrine is not that the courts pronounce inspired law, but that lawyers and business men and the community in general transact their affairs upon the belief that the courts will not recklessly disregard prior decisions, that such decisions become in a degree rules of conduct. The view entertained by Baron Parke of the nature of the rule of *stare decisis* is but a corollary of the conception of law which divorces it from all other branches of human learning and attributes a mystic importance to the utterances of judges and legislators. I have frequently heard lawyers refer with some asperity to Justice Temple's remarks in Alferitz v. Borgwardt where, referring to a certain previous decision of the Supreme Court, he says, concerning the binding force of judicial precedent:[4]

> "Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong, the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity."

It has always seemed to me, however, that Justice Temple has better understood the philosophy of precedent than did Baron

---

[4] (1899), 126 Cal. 201, 208, 58 Pac. 460.

Digitized by Google

Parke and his contemporaries. Indeed, American courts, in general, have regarded the matter of the binding force of judicial precedent with more common sense and more insight into the real nature of the rule *stare decisis* than have the English courts. Thus, for example, our Supreme Court of the United States has, on occasions which are matters of general history, consciously overruled former decisions as contrary to reason. The English House of Lords, on the other hand, regards itself as absolutely bound by its prior opinions. Perhaps the most extreme application of this doctrine is to be found in the case of Beamish v. Beamish,[5] where Lord Campbell and the majority of the judges in the House of Lords felt themselves bound, contrary to what they believed the law to be upon the evidence of history, by the prior decision in Regina v. Millis,[6] decided eighteen years before, although the last named decision resulted solely from the fact that the House was equally divided, and therefore unable to reverse the decision appealed from. Upon this tenuous and fragile basis rested the rule of the common law of England, which declared void a marriage celebrated in Ireland before a minister of the Presbyterian Church, where one of the parties belonged to the Established Church of England and the issue of such marriage illegitimate.

It is often suggested that our system of jurisprudence is now-a-days becoming mechanical, that the courts are enmeshing themselves in webs of precedent, that the great multiplication of reports is bringing about a system something like that described by Professor Calisse in his account of the medieval jurists. Doubtless there are individual lawyers and judges, doubtless there are even jurisdictions where the courts prevalently rely upon the mere marshalling of precedents, the haphazard citation of decisions, text books and compendia, for the purpose of settling the questions of law with which they have to deal. But so there are in the body politic individuals who in their habits of thought and life have not progressed beyond the medieval era,—nay, the annals of our criminal courts disclose men here and there who have not advanced beyond the intelligence and moral plane of cave-men. In such matters, we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdictions today a more rational theory as to the binding force of precedent gen-

---

[5] (1861), 9 H. L. C. 274.
[6] (1843), 10 Cl. & F. 534.

Digitized by Google

erally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have, in part from the very copiousness of authority, come to regard precedent as their servant and not as their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence.

> "The value of these reports to the judge," says Judge John F. Dillon,[7] "is absolutely incalculable. It is a mine of wealth possessed by none but English speaking peoples. Here the lawyer finds his true riches. What the art collections in the Vatican, in the Tribune Room, in the Pinacothek, in the Dresden gallery and in the Louvre, are to the artist, the judicial reports are to the English and American lawyer. I yield to none in my estimate of the store of riches they contain. I have not yet mentioned one of the chief elements of their possible usefulness. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines forth from them to mark out and illumine the legislator's pathway. He need scarcely take a single step in the dark."

It is interesting to observe that while the American lawyer and judge, through the very wealth of precedent, is beginning to deal with the rule of *stare decisis* in a more liberal spirit than of old, the continental lawyer is beginning to employ judicial decisions with greater freedom than formerly. The decisions of the Supreme Court of the German Empire and of the constituent states are now published in somewhat the same manner as the Reporter System. Not long since, I heard a lawyer, a Socialist member of the Reichstag, argue before a Berlin court the question as to what was a lawful assembly, and I was surprised to hear that most of his argument rested upon decisions of the courts of the various states of the German Empire, and that it did not differ essentially from the sort of legal argument one hears every day in our own tribunals.

If we have in many instances abandoned the theory of Baron Parke, that a written authority, though unknown to the public, is binding upon succeeding judges, it must be admitted that we

---

[7] Dillon, The Laws and Jurisprudence of England and America, 234.

Digitized by Google

sometimes unconsciously revert to the view that precedent must constitute the law, regardless of the nature and character of the principles involved. Our lamented late Chief Justice more than once pointed out that, in mere matters of practice, especially where the rule of a decision foreclosed an investigation of a case upon its merits, the doctrine of *stare decisis* should not be followed.[8] He uniformly dissented from orders dismissing appeals because they were prematurely taken, basing his dissent upon the ground that the court was wrong originally in holding that such appeals should be dismissed, and refusing to admit that the principle was established by former decisions, because in matters of pleading and practice he maintained the rule of *stare decisis* should not be followed where its only effect would be to give a party an unjust advantage in precluding the hearing of a case upon its merits.[9] No man, he thought, should have a vested right in maintaining an unjust or merely technical position, by reason of the fact that the court had once sustained such a position. It is in such glimpses as these of profoundest insight into the real nature of law, it seems to me, that the legal genius of our revered Chief Justice shines out. He had so lived that justice through law had become an eternal part of his being, and he seemed the very embodiment of the living law.

Perhaps there are fields other than that of procedure where the doctrine of the binding force of judicial precedents may well be diminished. The field of constitutional interpretation would seem to be one of these. I have been told that the Supreme Court of the United States no longer follows the constitution but has adopted Mr. Dooley's ideas. It would seem to me that the more recent decisions of that court under the Fourteenth Amendment are, on the whole, getting nearer to the reasonable construction of the language of that famous amendment than did their predecessors. That it is depriving a banker of his property or liberty without due process of law to make him a guarantor of other bankers in his state would seem to require a very peculiar construction to be placed upon the words "deprive," "property," "liberty," and "due process of law." We may not personally like that sort of a

---

[8] Bell v. Staacke (1902), 137 Cal. 307, 309, 70 Pac. 171.

[9] Chief Justice Beatty says, in Bell v. Staacke: "A rule of procedure which is founded upon a misconstruction of a statute and which operates only as an obstacle to the consideration of causes upon their merits is not protected by the principle of stare decisis."

Digitized by Google

law, and it may be very foolish from an economic standpoint, but it would be stretching the meaning of language to hold that the Fourteenth Amendment was ever intended to embrace such a case. If former opinions justified the conclusion that the words of the amendment forbade a state from committing economic suicide, then let us do as did the Italian humanists in the fifteenth century, go back to the sources, disregard comments and read the original. If some lawyers criticize the court for its reversal of views concerning the police power with respect to the "property" clause in the Fourteenth Amendment, a very respectable body both of lawyers and laymen criticize it, and with far more reason, it is submitted, for its attitude on the "liberty" clause in the same amendment. It may be very desirable—I do not say that it is—that a baker should have the right to work as long as he pleases, or that an employer should have the right to discharge a workman because he belongs to a labor union, but to hold that these rights are guaranteed by that clause of the Constitution that says that a man shall not be deprived of life, liberty, or property, without due process of law, is putting a very strange construction upon the word "liberty," especially considering its context. One would think that in the phrase respecting deprivation of "life, liberty or property," "liberty" merely meant freedom from constraint, but the authorities hold otherwise. The whole battle between the majority and the minority of the court upon this crucial question hinges in its ultimate analysis upon the question whether or not the rule of *stare decisis* should be followed in all of its consequences. The rule of the binding force of precedent should have, it is submitted, less force in this class of cases than in almost any other. It seems absurd to claim that one has acquired rights relying upon the unconstitutionality of a statute; it is a very different thing, of course, where he has acquired rights relying upon its constitutionality. In passing, it may be of interest to note that by virtue of the recent amendment to the Judicial Code which allows writs of error to the state courts, even though they decide in favor of a right claimed under the federal Constitution,[10] it is probable that a large amount of state legislation, usually regarded as killed by decisions of state supreme courts, may become suddenly animated. For example, who can say that the United States Supreme Court would necessarily sustain the

[10] 1914-15 U. S. Public Statutes, 790.

Digitized by Google

view of the unconstitutionality of the statutory provision respecting attorneys' fees in mechanics' lien suits, laid down in Builders Supply Company v. O'Connor? At any rate the question is now open for review by that tribunal. I have no doubt that much important legislation, particularly social legislation, is given life by this modest amendment, which seems to have attracted but little public comment.

In the field of substantive law, nothing can be more important than that the principle of *stare decisis* should be scrupulously observed. It is, like that of prescription, fundamental. Nor is the principle lightly to be disregarded in any field. "Imitation of the past," says Justice Holmes, "until we have a clear reason for change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different thing we want." "Doubt as to the value of some of these rules is no sufficient reason why they should not be followed by the courts. Legislation gives notice at least if it makes a change."[11] Only let us remember that the judicial precedent is not a sacro-sanct thing; it is, after all, but a human contrivance, and like all human contrivances may have been originally imperfect, and even though originally fitted for use, may have become outworn.

Closely connected with the theory of *stare decisis* is that of statutory interpretation. Neither theory seems, in the present state of legal science, to be capable of precise statement. The German Civil Code of 1900, for example, the most scientific and carefully wrought out code of law in existence, does not profess to state the principles which should govern its interpretation. The hope that the rules of law may be expressed in small compass and clear language so as to obviate the need of interpretation is chimerical. The best constructed statute or document will require interpretation, though as Professor Pound has pointed out, there is a difference between genuine interpretation which merely discovers the meaning of a statute, and spurious interpretation which is really legislation masking under the guise of judicial action.[12] A piece of work like the German Civil Code or on a smaller scale, the English Partnership Act, or the American Uniform Sales of Goods Act, minimizes the work of the

[11] Review of Holdsworth's History of English Law, 25 Law Quarterly Review, 412.
[12] 7 Columbia Law Review, 379.

Digitized by Google

courts in supplying deficiencies and confines their labors to true interpretation. Our own Civil Code, on the other hand, is by no means a piece of legislation which confines the courts to the field of genuine interpretation. The student who should approach his study of law through the Civil Code would wholly fail to grasp the fundamental features of our system. Take, for example, the matter of water rights, a field of the utmost importance. He would find no trace in the Code of the doctrine of riparian rights; the information he would gain as to the doctrine of appropriation would be almost negligible, and for the most part erroneous. He would find no sections dealing with percolating or surface waters. In short, if he would learn anything substantial concerning our system of water law, he would be obliged to go to the law reports. That branch of the law is of necessity judge-made, for the legislature has not acted upon the subject.

But not only have our courts been obliged by the process of judicial law-making to supply the omissions of the legislature, they have also been obliged, in the interests of justice, to construe sections of the code in a manner which may be called spurious interpretation, but which, so long as the true principles of legislation are neglected by our legislatures, will remain a continuing necessity. For example, the Civil Code not only enumerates the cases in which covenants run with the land, but provides in section 1461, that "the only covenants which run with the land are those specified in this title." Yet the law of California recognizes the doctrines of equity with respect to the running of covenants, and the courts enjoin breaches by assignees of the land of covenants not among those specified in the title. In fact, the whole matter of equity is practically unaffected by the code, although it purports to state the entire law.

Even where statutes are more carefully constructed than our hastily constructed Civil Code, even in such pieces of legislation as the Sales Act, the process of interpretation requires more than a literal reading of the words of a statute. Some remarks of Professor James Bradley Thayer concerning the parol evidence rule are pertinent to the matter of statutory interpretation because of the shortcomings of language to express thought. He refers to "that lawyers' Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purpose, not only with accuracy but with fullness; and where, if the writer

Digitized by Google

has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text and answer all questions without raising his eyes. Men have dreamed of attaining for their solemn muniments of title such an absolute security; and some degree of security they have compassed by giving strict definitions and technical meanings to words and phrases, and by rigid rules of construction. But the fatal necessity of looking outside the text in order to identify persons and things, tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether written or spoken."[13]

Sound interpretation demands not only a knowledge of the history of doctrines, a knowledge of the conditions which gave birth to the legislation, but also a knowledge of social needs, of the conditions now existing. The statute must be viewed as a part of a whole, and not as a separate and independent creation. One of the greatest dangers in the modern tendency to withdraw from the courts matters of a semi-administrative character and to lodge them in special tribunals probably lies in the fact that such tribunals are very prone to adopt a narrow and technical reading of the law which it is their duty to interpret. The layman is very apt to stick to the letter, to disregard the spirit and intention of the statute. In his worship of technicality, despite his disavowals, he frequently "out-Herods Herod." If called upon to apply the famous statute, of which Blackstone speaks, which decreed a punishment for anyone who let blood on the streets of Bologna, he would probably hold the surgeon guilty who should bleed an injured patient. Very learned and respectable courts, however, have sometimes interpreted statutes in the same spirit. Witness the interpretation given by the Massachusetts court to the bigamy statute in Commonwealth v. Mash,[14] and followed by our court in People v. Hartman,[15] to the effect that a bona fide belief that he was a single man, did not excuse one from punishment under a statute providing that "Every person, having a husband or wife living, who marries any other person, is guilty of bigamy," where in fact, he had a former wife living. The opinion of the United States Supreme Court in the Standard Oil case which read into the penal statute the "rule of reason" seems to be based on a more just view as to the essential nature of

[13] Thayer, Preliminary Treatise on the Law of Evidence, 428-9.
[14] (1844), 7 Met. 472.
[15] (1900), 130 Cal. 487, 62 Pac. 823.

Digitized by Google

criminal intent.[16] Cases such as Commonwealth v. Mash, and People v. Hartman, rest upon a theory of legislation which imputes to the legislative body a perfection and completeness of expression that is not usually found in legislatures or in human affairs generally. As a matter of fact, as everyone knows, legislative expressions usually fall very far short of stating the totality of conditions.

The increasing mass of legislation, usually crudely prepared and imperfectly expressed, is constantly placing upon courts a larger burden in respect to interpretation. It may be that in a more perfectly adjusted system of government the field of interpretation would be narrower than it now is, and it may be desirable that such should be the case. But the fact remains that the tendency is at the present time in the direction of increasing rather than diminishing this function. Professor Pound, a critic of so called spurious interpretation, says, in his very interesting paper on the subject:

> "Courts must decide cases; they must decide them in accord with the moral sense of the community so far as they are free to do so. If the proper agencies of government do not supply the necessary rules, they must administer justice without rules or must make rules. Granting this, the fact remains that there should be no such necessity, or at least it should be reduced to a minimum in the modern state. Over-rigid constitutions, carelessly drawn statutes, and legislative indifference toward purely legal questions are not permanently remedied by wrenching the judicial system to obviate their mischievous effects. As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making. Both are out of place in a modern state."[17]

It is perhaps unnecessary before an assembly of lawyers to dwell upon the evils of over much legislation, to call attention to legislative inconsistencies, to point out how the introduction of direct legislation has complicated the problems of the law, regarded merely from the professional point of view. We are accustomed to think of the British Parliament as rather a superior legislative assembly, and we know that for many years the acts passed by that Parliament have had the advantage of being drafted by

---

[16] (1911), 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502.
[17] 7 Columbia Law Review, 386.

Digitized by Google

skilled lawyers employed as legislative draftsmen. And yet Sir Courtenay Ilbert, for a long time parliamentary counsel, and now clerk of the House of Commons, has this anecdote to tell us about the Mutiny Act, which you may remember was an act first passed at the beginning of the eighteenth century, providing for the support and maintenance of the standing army, and which, because of the fear entertained by Englishmen of such establishments being used by the executive against the liberty of the country, was passed annually by Parliament. With true British inconsequentialism, the army part of the act was a "rider" to a bill respecting the suppression of mutinies. Sir Courtenay Ilbert says:

> "For many generations nobody thought of reading the Mutiny Acts. They were in the old form, and everybody took it for granted that they were all right and merely reproduced the existing law. You may perhaps know that each Mutiny Act used to come into operation, as the Army Act still does, at different times in different parts of the world. And I remember discovering in one of the very last of them a provision that it should come into operation at a specified date in Spain and Portugal. This provision had been inserted at the time of the Peninsular War, and like the sentry in front of the guarded flower in the old Russian story, had remained unnoticed ever since. Nobody had taken the trouble, or had thought it worth while, to strike it out, and there it stuck till near the end of the nineteenth century."[18]

And Sir Frederick Pollock picturesquely describes the process of modern law-making in language whhich is even more true for our own country than for his.

> "Many an act of Parliament, originally prepared with the greatest care and skill and introduced under the most favorable circumstances, does not become law till it has been made a thing of shreds and patches hardly recognizable by its author, and to any one with an eye for the clothing of ideas in comely words, no less ludicrous an object than the ragged pilgrims described by Bunyan: 'They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind, there a rag and there a rent to the disparagement of the Lord'."[19]

If such be the work of the best of legislative bodies, what shall we say of the work of most of our American legislatures!

---

[18] The Mechanics of Law Making, 107.
[19] Some Defects of Our Commercial Law, in Essays on Jurisprudence and Ethics, 80.

Digitized by Google

In the chaos and welter of legislation, how is the lawyer whose duty it is in the first place to interpret the laws, how is the judge upon whom is laid the ultimate pronouncement as to their meaning, to guide his course? He must be able in some way to cultivate an instinct by which he can select from the mass of so-called law-making that which is really law from that which is not. Rules of thumb cannot carry him far. The education gained from his knowledge of the world, from his feeling for right, from his acquaintance with the history of his legal system, must give him that instinct. The legislature cannot altogether make law any more than can the courts. Nay, even the sovereign people are not altogether absolute. The natural and social forces that govern man are the living springs from which the law derives its being. You can pass usury laws until the statute books burst and you will still have usury with you in some form; you can enact eugenic laws from now till doomsday, but I doubt whether you will eradicate deformity and misery. When a rule ceases to be adapted to social conditions, it ceases to have legal effect. For example, theoretically the action for criminal conversation, or damages for alienation of a wife's affections, the kind of action in which Curran first achieved his great reputation as an advocate in the Marquis of Headfort's case, and in which the late Lord Chief Justice Russell of Killowen shone at his best when at the bar, exists in California, but I doubt whether anyone in this room would advise the beginning of such an action. I do not know of any statute in this state abolishing distress for rent, but I shouldn't care to try to collect rent by that means. The legal history of our state is full of examples of active principles of law created by social and economic conditions. Our mining and water laws at once occur to the mind. But not less characteristic are many rules dealing with fundamental rights. Our law of self-defense, our law of costs, which tends to discourage actions for torts where the injury is slight, our liberal homestead and exemption statutes, our laws forbidding creation of limited liability companies, all throw a vivid light upon our social and industrial life. A very great law teacher of the last generation said that "all the available materials of the science of law are contained in printed books."[20] I think that almost any practitioner would deny this. The

[20] C. C. Langdell, quoted in Redlich, The Case Method in American Law Schools, Bulletin No. 8 of the Carnegie Foundation for the Advancement of Teaching, 15.

Digitized by Google

distinguished lawyers and judges who in our pioneer history first laid down the law respecting the appropriation of waters certainly did not extract their principles from printed books, but had read rather deeply in the great book of human nature.

I am not defending a system or a theory of law by which, in some mysterious way, courts and lawyers are to discover the views of what is right according to dominant public opinion and are to conform existing legal institutions to these views. That would be the negation of law, whose very essence is form. Bagehot says: "An ill-knit nation which does not recognize paternity as a legal relation would be conquered like a mob by any other nation which had a vestige or a beginning of the *patria potestas*."[21] And what is true in primitive society and in a fundamental personal relation, is equally true today and in the most complex relations. A modern nation which becomes lax in the enforcement of contracts or the protection of property is sure to retrograde in civilization. But when we speak of property we do not necessarily mean absolute private property. An absolute right of property in every individual, says von Ihering, would result in the dissolution of society.[22] Every man's hand would be against every other man's. Property only exists as an active principle by virtue of the state and the protection which the state throws about it.

In the modern law regarding such fundamental legal conceptions as property, we see the changing view of law. The English courts of the first half of the nineteenth century, many American courts of even a later era, perhaps some even at the present day, were coming to regard rights of property as in their nature absolute and unyielding. The student of English legal history cannot fail to notice how, for a long period, the dominant public opinion which directed the development of the law was that dictated by the landed interest. How otherwise can such an anomaly in the law of fixtures be explained as that in the case of agricultural lands, the doctrine of trade fixtures did not apply? Originally all fixtures belonged to the landlord absolutely, and in fact, originally, the leasehold as a protected legal institution did not exist. As soon as England became to some extent a commercial country, almost as soon as the leasehold interest gained full protection, the trading classes obtained for themselves the right to remove trade fixtures. The innovation, however, was not extended to

[21] Physics and Politics, 124.
[22] Cited in Ely, Property and Contract, I, 137.

Digitized by Google

agricultural tenants in England, until well along in the nineteenth century the matter was taken up by Parliament, though in democratic America the courts refused to follow the distinction between trade and agriculture. Land was never, so long as the landed classes held their undoubted sway, subject to execution for debts. It was not until the commercial interests had displaced the landed influence that the modern law on this subject became fixed in its present form. Property became more fluid as the men of commerce became more influential, and the medieval legal system which rested upon the law of real property and status as its bases was supplanted by a system which rested upon contract. The theory of our law came to be that men had the right to regulate their conditions exactly as they pleased by contract. But here too the theory of the absolute right of contract, just as the previous theory of the absolute right of individual property, began to yield to the demands of altered public opinion. The history of modern English and American law is in large part the story of the limitations that have been placed upon the absolute principles of property and of contract in the interests of society. Abolition of imprisonment for debt, homestead and other exemptions, bankruptcy and insolvency laws, are examples of the departure of the modern law from the principle of absolute obligation in the law of contracts. On the other hand, the advancing moral sense of the community has, in other respects, fortified and strengthened the duty of keeping faith by improving methods of enforcing obligations. The remedy of specific performance has, especially in England, been so extended that the court may decree specific relief in any case where it is deemed just, irrespective of technical limitations. Moreover, the tendency indicated in many jurisdictions of awarding the contract price in cases of breaches of executory contracts for the sale of goods, makes the risk attendant upon a breach much more considerable, and directly contributes to the keeping of one's word. So, also, the modern doctrines with regard to anticipatory breach and with respect to the mutual dependency of conditions in contracts. The conception of individual rights which recognized a right to break a contract has been entirely supplanted by a more social view of contractual relations. Again, in the field of torts, the idea that liability should, in general, be dependent only upon fault was wrought out in the history of our law only after centuries of debate and discussion. Yet hardly had this principle been settled

Digitized by Google

than the increasing complexity of modern industry has caused an extension of the so called doctrine of *res ipsa loquitur*, the introduction of such theories as that of the "last clear chance," the legislative adoption of principles of absolute liability, as in the Industrial Accidents Act,—in short, a return in part to the ancient theory of absolute responsibility.

There is not time to illustrate the altered views in relation to the vastly important questions involved in combinations of capital and labor, in relation to the reform of the criminal law, in relation to the reform of procedure and the practical administration of the law. What has been said is sufficient, I think, to show that our law is in an era of rapid transformation, an era of revolution. So rapid have been the changes that our greatest living practical jurist, Mr. Justice Holmes, has said, "To have doubted one's own first principles is the mark of a civilized man."[23] But because he may sometimes doubt his first principles, the lawyer knows that he must not abandon them merely for that reason. He knows too well that most things in this life depend upon presumptions, and he recognizes that the mere fact of the existence of a rule or an institution places upon those attacking it the burden of proof. "The science of jurisprudence, the pride of the human intellect, which with all its defects, redundancies and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns,"[24] as Burke terms it, is not to be abandoned because a few shallow critics exaggerate here and there a casual fault or a special instance. We know that our civilization, our most precious rights and possessions, owe their being to our law. We know that its preservation is the most important task that we as lawyers must perform. "If there is any virtue in the Common Law," says Sir Frederick Pollock, "whereby she stands for more than intellectual excellence in a special kind of learning, it is that Freedom is her sister, and in the spirit of Freedom her greatest work has ever been done. By that spirit our lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal justice and ordered right into every quarter of the world. By the fire of that spirit our worship of her is touched and enlightened, and in its power, know-

[23] Ideals and Doubts, 10 Illinois Law Review, 1.
[24] Reflections on the French Revolution, (Little, Brown & Co. edition), III, 357.

Digitized by Google

ing that the service we render to her is freedom, we claim no inferior fellowship with our brethren of the other great faculties, the healers of the body and the comforters of the soul, the lovers of all that is highest in this world and beyond. There is no more arduous enterprise for lawful men, and none more noble than the perpetual quest of justice laid upon all of us who are pledged to serve our lady the Common Law."[25]

Orrin K. McMurray.

---

[25] The Genius of the Common Law, 124-5.

Digitized by Google

What Is Beneficial Use of Water?

UNDER the law of prior appropriation of water the prior appropriator is entitled to retain from later claimants the water which he puts to beneficial use. Beneficial use is now the final test.[1]

What is beneficial use? In collecting the authorities four years ago, the present writer said: "The question is one of fact, a very general one, to be left broadly to the jury (or to the court, if sitting without one), and the result in any particular case will depend upon the attitude which the jury (or judge), as reasonable men, will take toward the evidence as a whole when presented to them at the trial."[2] It is the object of this paper to consider the decisions since rendered.

---

[1] "An inherent and necessary limitation." Schodde v. Twin Falls L. & W. Co. (Idaho, 1911), 224 U. S. 107, 53 L. Ed. 686, 32 Sup. Ct. Rep. 470. "Not as new legislation, but as the established definition of a water right." San Joaquin etc. Canal & Irr. Co. v. Stanislaus County, (Cal., 1911), 191 Fed. 875, 896; Imperial Water Co. v. Holabird (Cal., 1912), 197 Fed. 4, quoting the Desert Land Act of March 3, 1877, 19 Stat. 377, and saying that this is applicable to irrigation on all public lands.

California: Evans Ditch Co. v. Lakeside Ditch Co. (1910), 13 Cal. App. 119, 108 Pac. 1027; Hufford v. Dye (1912), 162 Cal. 147, 121 Pac. 400; Dannenbrink v. Burger (1913), 23 Cal. App. 587, 138 Pac. 751; In re James A. Murray (1913), 2 Cal. Ry. Com. Dec. 464; 1913 Stat. Cal. 1012, §§ 11, 20; Cal. Civ. Code, § 1411.

Idaho: Lee v. Hanford (1912), 21 Idaho, 327, 121 Pac. 558; Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038; Washington State Sugar Co. v. Goodrich (Idaho, Mar. 3, 1915), 147 Pac. 1073.

Oregon: Caviness v. La Grande Irr. Co. (1911), 60 Ore. 410, 119 Pac. 731; Cantrall v. Sterling Mining Co. (1912), 61 Ore. 516, 122 Pac. 42; Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666, 125 Pac. 270; Claypool v. O'Neill (1913), 65 Ore. 511, 133 Pac. 349.

Wyoming: Nichols v. Hufford (Wyo., 1913), 133 Pac. 1084.

[2] Wiel, Water Rights in the Western States, 3d ed. § 481.

Digitized by Google

I.

Negatively, the recent decisions upon "beneficial use" have been strong; that is, in laying down what it is *not*. It is not the amount originally claimed in a notice of appropriation, or in an application to the state engineer for a permit, or in a permit issued by him.[3] It is not the capacity of the appropriator's ditch when a reasonable time has elapsed without diverting that amount of water into it.[4] It is also not even the quantity of water actually diverted into the ditch, however long such diversion was continued;[5] and it is not what is used at time of largest use alone, but varies with use at other times, ceasing entirely at such parts of the season as the use ceases.[6]

These negative propositions repeat in recent decisions. Partly this is because the older claimants (slow in getting used to them) still press for the contrary; partly because the older decisions to some extent themselves contained matter to the contrary. The pioneers' law of prior appropriation was a possessory law, and

---

[3] Hufford v. Dye (1912), 162 Cal. 147, 121 Pac. 400, (2000 inches claimed in notice cut down to use); Trimble v. Hellar (1913), 23 Cal. App. 436, 138 Pac. 376; Cal. Pastoral etc. Co. v. Madera Canal etc. Co. (1914), 167 Cal. 78, 138 Pac. 718; Washington State Sugar Co. v. Goodrich (Idaho, Mar. 3, 1915), 147 Pac. 1073, (sale passes only the amount beneficially in use by vendor); Bailey v. Tintinger (1912), 45 Mont. 154, 122 Pac. 575; Hedges v. Riddle (1912), 63 Ore. 257, 127 Pac. 548, (amount named in permit); Bowen v. Spaulding (1912), 63 Ore. 392, 128 Pac. 37; Nichols v. Hufford (Wyo., 1913), 133 Pac. 1084. Cf. In re Commonwealth Power Co. (1913), 94 Neb. 613, 143 N. W. 937; Kersenbrock v. Boyes (1914), 95 Neb. 407, 145 N. W. 837; Hagerman Irr. Co. v. McMurry (1911), 16 N. Mex. 172, 113 Pac. 823; Water Rights in the Western States, 3d ed. §§ 376, 417, 473-479.

[4] Peterson v. Cody (1910), 14 Cal. App. 502, 112 Pac. 558; Trimble v. Heller (1913), 23 Cal. App. 436, 138 Pac. 376; Cal. Pastoral etc. Co. v. Madera Canal etc. Co. (1914), 167 Cal. 78, 138 Pac. 718; Dannenbrink v. Burger (1913), 23 Cal. App. 587, 138 Pac. 751; Turner v. East Side Canal etc. Co. (Cal., Mar. 23, 1915), 147 Pac. 579; Bailey v. Tintinger (1912), 45 Mont. 154, 122 Pac. 575, (after a reasonable time); Conrow v. Huffine (1914), 48 Mont. 437, 138 Pac. 1094; Nichols v. Hufford (Wyo., 1913), 133 Pac. 1084.

[5] Hufford v. Dye (1912), 162 Cal. 147, 121 Pac. 400; Cal. Pastoral etc. Co. v. Madera Canal etc. Co. (1914), 167 Cal. 78, 138 Pac. 718; Dannenbrink v. Burger (1913), 23 Cal. App. 587, 138 Pac. 751; San Joaquin etc. Canal & Irr. Co. v. Stanislaus County (Cal., 1911), 191 Fed. 875; Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666, 125 Pac. 270.

[6] Hufford v. Dye (1912), 162 Cal. 147, 121 Pac. 400; Wolff v. Pomponia (1911), 52 Colo. 109, 120 Pac. 142; Caviness v. La Grande Irr. Co. (1911), 60 Ore. 410, 119 Pac. 731; Sherred v. City of Baker (1912), 63 Ore. 28, 125 Pac. 826; Claypool v. O'Neill (1913), 65 Ore. 511, 133 Pac. 349; In re North Powder River (Ore., 1914), 144 Pac. 485; Parshall v. Cowper (Wyo., 1914), 143 Pac. 302.

Digitized by Google

looked upon each as the owner of all he took into possession or "located," which was what his notice said or at least what his ditch held, like a notice or staking-out of a mining location; possession rather than use was the determinative factor.[7] The gradual change since then to a "use" system from a "possessory" one puts upon the decisions now the necessity of disposing of much of what there was in the older law. Thus the Supreme Court of Oregon recently expressly overrules an earlier decision based upon capacity of ditch.[8] Hence the importance paid by the decisions now to laying down what beneficial use is *not*.

II.

Upon the affirmative side, saying what beneficial use *is*, the inquiry has been devoted to the "duty of water," whereby "beneficial use" is expressed in scientific units, namely, the water needed per acre of land or the acres irrigable by a unit of water. To the amount of water thereby indicated an allowance is added to cover the necessities of transmission to the land from the source of supply, and the total (consisting of the acreage multiplied by the per-acre duty and increased by the transmission allowance) is measured to the appropriator, or is declared to be his right, at the point of diversion from the natural stream,[9] since it is the flow of the stream as a natural resource that is the basis of any independent water-right.

Before speaking of the "duty of water," the question of transmission allowance may receive a word or two.

The transmission allowance is declared in terms containing some qualification to denote that it must not be excessive; the word "reasonable" being considerably used. Thus, one case in Nevada says transmission losses (seepage and evaporation) are allowed if "reasonable and economical methods of diversion" are shown,[10] and another in California, if such losses could not be prevented by "reasonable care or precaution,"[11] and another in Ore-

---

[7] See Water Rights in the Western States, 3d ed. § 139.

[8] Donnelly v. Cuhna (1911), 61 Ore. 72, 119 Pac. 331, 332, overruling Coventon v. Seufert (1893), 23 Ore. 548, 32 Pac. 508.

[9] Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666, 125 Pac. 270; Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038.

[10] Doherty v. Pratt (1912), 34 Nev. 343, 124 Pac. 574; but holding a loss of 2-3 volume in 3 miles not such.

[11] "Some loss in this way is inevitable and it must be considered a part of that which is necessary to be taken to supply the actual use proposed. There was evidence to the effect that there would be no

Digitized by Google

gon says "reasonable care and diligence."[12] In another in California it is said such losses are allowed so far as they are "unavoidable."[13] In other cases qualifying words are used.[14] That some allowance will be made is accepted; and in determining how much, examination is made by the court of the facts of each case, and the courts then pass upon whether the degree of loss is shown to be reasonable.[15]

A somewhat analogous allowance has been recognized for affording a head to carry the water to the land and to enable the spread of it when there delivered. The nearer level the grade of ditch between stream and farm, the more water required to maintain a flow in it; the nearer level the irrigated land, the more water required to make water spread when brought there. Some additional allowance to maintain a "head" to meet this has been recognized.[16] There is no fixed degree laid down to which such allowance will go. These cases leave it discretionary with the court; that is, a "reasonable" allowance upon the facts of each case is made for the purpose.

It appears, therefore, that the degree of transmission allowance being recognized by the courts is such as is reasonable in each

---

loss of this character which could be prevented by reasonable care or precaution." San Joaquin etc. Co. v. Stevinson (1912), 164 Cal. 221, 128 Pac. 924.

[12] Joseph Milling Co. v. City of Joseph (Ore., 1914), 144 Pac. 465 at 467.

[13] "There is generally some unavoidable waste in any large irrigation system. Water must be turned into canals leading to lands where it is to be used. The users may not be ready to commence taking it. As it cannot then be turned back and made to run up hill, it must be allowed to run down and go to waste, unless some independent user takes it below the waste gate. So much of the water as may be unavoidably wasted is to be deemed a part of that which is appropriated to the beneficial use and which the company has the right to take. It is necessary to the user and is in the same category as that lost in transmission by evaporation and unavoidable seepage." Thayer v. California Development Co. (1912), 164 Cal. 117, 128 Pac. 21.

[14] Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038; Little Walla etc. Union v. Finis Irr. Co. (1912), 62 Ore. 248, 124 Pac. 666, 125 Pac. 270.

[15] Incidentally, scientific investigation has shown that evaporation in transmission is a negligible quantity, and large losses are due almost wholly to leakage and seepage. Bulletin 126 U. S. Dept. of Agriculture; Bulletin 248 Office Experiment Station, U. S. Dept. of Agriculture; Second Progress Report of Co-operative Irrigation; Investigation in California, by Frank Adams, U. S. Experiment Station Circular 108; State v. Twin Falls Canal Co. (1911), 21 Idaho, 410, 121 Pac. 1039; Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666.

[16] State v. Twin Falls Canal Co. (1911), 21 Idaho, 410, 121 Pac. 1039; Hedges v. Riddle (Ore., Feb. 9, 1915), 146 Pac. 99; Report of 1908-1910 of State Engineer of Nebraska.

Digitized by Google

case upon its own facts, which is a discretionary matter with the court, as are all matters where "reasonableness" governs the decision.

With these transmission factors allowed, the decisions have considered the "duty of water" after it has been delivered to the place of use.

III.

The duty of water is found not to be a constant factor for all places, but varies with the character of soil and sub-soil, climatic conditions, diversification of farm crops, rotation in use, preparation of land, kind of crop,[17] ground water level, method of irrigation (whether in deep furrows or by flooding) and various other conditions.[18] It will also, as already noted, vary with the head under which the water flows.[19] Consequently the Supreme Court of Oregon says: "We recognize the great difficulty of estab-

---

[17] Alfalfa, for example, needs 50% more than hay. Report of Idaho State Engineer, 1909-1910, p. 270.

[18] "It depends upon the character of the soil, the climate and other conditions, as well as the manner of its application." Little Walla Irr. Co. v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666, 125 Pac. 270. In another case it is said: "The duty of water depends upon the character and conditions of the soil," and "The nature of the soil is so varied that it is absolutely impossible to establish a uniform standard of duty of water." Washington State Sugar Co. v. Goodrich (Idaho, Mar. 3, 1915), 147 Pac. 1073. See Report of Idaho State Engineer, 1909-1910, p. 222.

[19] The Supreme Court of Oregon says: "Only a small part of ½ inch per acre could be carried to the land without the use of an expensive means of conveying it, which is not justified in this case." Hedges v. Riddle, (Ore., Feb. 9, 1915), 146 Pac. 99. The Supreme Court of Idaho says in State v. Twin Falls Canal Co. (1911), 21 Idaho, 410, 121 Pac. 1039: "It is a well recognized fact that, in order to properly irrigate land, the irrigator must have a proper stream or head of water, and the question arises as to how much water is necessary to furnish a sufficient head or stream for that purpose. I think it will not be disputed that an inch to the acre, if measured out in a constantly flowing stream, is not sufficient for the proper irrigation of a small tract; so for the proper irrigation of small tracts of land there is needed a head or stream of water of sufficient size to be efficiently handled and flowed over the land. It is more convenient and economical to use water in as large heads or volumes as can be conveniently used by the irrigator. Much of the land in the Snake River valley is of the character or kind that, unless you have a sufficient head of water to rush it over the land, the sandy and gravelly soil will absorb all of it and not permit it to pass on over the land. Hence to successfully irrigate land, a sufficient head of water is required to flow entirely over the land. A second-foot of water, which consists of about 50 miner's inches, is as small a stream or head of water as can be efficiently used in the irrigation of the lands in the Snake River valley." State v. Twin Falls Canal Co. (1911), 21 Idaho, 410, 121 Pac. 1039. The State Engineer of Nebraska says in his

Digitized by Google

lishing the duty of water,"[20] and the Supreme Court of Idaho said: "It is absolutely impossible to establish a uniform standard of duty of water."[21]

The ruling is that the duty of water is a matter of proof separately in each case according to the facts put in evidence. An Oregon case gives special consideration to this question. A previous Oregon case had been interpreted as fixing a presumption of law for a certain duty of water[22] and the propriety of the author's interpretation was argued with some heat in the subsequent case. The court settles that there is no presumption in the matter.[23]

The highest duty mentioned in recent decisions that the writer has noted is one-tenth of a miner's inch (1-400 second-foot) per acre;[24] the lowest, three inches per acre under the conditions shown (gravelly soil and level land).[25] The proof generally is for a duty of one inch per acre, and awards upon that basis have been made more frequently in the courts of last resort than upon any other. It has been allowed in Colorado, Idaho, Montana, Oregon and

---

report for 1908-1910: "Where small acres are irrigated under an allotment of 1-70 of one cubic foot per second continuous flow for one acre, the amount allowed is so small that a proper distribution and application is impossible."

[20] In re Willow Creek (Ore., 1914), 144 Pac. 505.

[21] Washington State Sugar Co. v. Goodrich (Idaho, Mar. 3, 1915), 147 Pac. 1073.

"It is evident that the reasonable degree of perfection of each of these requirements will vary with the locality and with different changing conditions in each locality, so that the beneficial use of water is a variable." Resolution 68 of Conference of Irrigation Managers of U. S. Reclamation Service, quoted in 2 Cal. Law Rev. 373.

[22] Water Rights in the Western States, 2d ed. § 170, 3d ed. § 481.

[23] Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666, 125 Pac. 270, saying: "Neither the law nor the decisions of the courts have fixed a definite or uniform amount as constituting the duty of water for irrigation in all cases, but it depends upon the character of the soil, the climate, and other conditions, as well as the manner of its application." Judge Will R. King (formerly of the Oregon Supreme Court, and now chief counsel for the United States Reclamation Service), who had written the opinion in which the alleged presumption was supposed to be contained, said as counsel in a later case: "We have not claimed, nor do we claim now that the courts have a right arbitrarily to fix the quantity of the flow of water required in the irrigation of any certain tract of land. Courts, of course, must be guided by the evidence, and that is all we ask in this case. When we say evidence, we mean sworn testimony, or such as the court will, under the law, be entitled to take judicial cognizance of, and not mere rumors or statements of counsel."

[24] Smith v. Cucamonga W. Co. (1911), 160 Cal. 611, 615, 117 Pac. 764. This specification was contained in an agreement between the parties, and not as a specification of fact by the court.

[25] Joyce v. Rubin (1913), 23 Idaho, 296, 130 Pac. 793.

Digitized by Google

Washington, subject to modification by evidence in each case.[26] For example: "While we have no legislation on the subject, the rule has generally been observed by the courts in this state, in fixing the amount required for economical use, to allow one inch per acre, unless the evidence discloses that a greater or less amount is required."[27]

This is more than allowed where statutes have enacted a duty of water. An inch per acre is forty to fifty acres per second foot (depending upon whether "inches" are under a six or four inch pressure respectively). The statutes vary from fifty to one hundred acres per second foot.[28] Where there is such statutory specification, the amount so specified will be followed in the absence or insufficiency of proof of the actual duty of water in the case.[29] Where, however, proof is offered for a larger amount of water than the statutory duty, it is an open question how far the proof may be heard in such jurisdictions. In Wyoming the court intimated *obiter* that proof "reasonably clear and satisfactory" might entitle an appropriator to an allotment exceeding the statutory limit,[30] and in Idaho, the Supreme Court has allowed more than the statutory limit, upon the proof in some cases,[31] saying that the

---

[26] Colorado: Larimer County Canal Co. v. Poudre Valley Reservoir Co. (1912), 23 Colo. App. 249, 129 Pac. 248, (sometimes 1-40 second foot).

Idaho: Gerber v. Nampa etc. Irr. Dist. (1908), 16 Idaho, 1, 100 Pac. 80; State v. Twin Falls Canal Co. (1911), 21 Idaho, 410, 121 Pac. 1039, (1 inch). See also Joyce v. Rubin (1913), 23 Idaho, 296, 130 Pac. 793.

Montana: Conrow v. Huffine (1914), 48 Mont. 437, 138 Pac. 1094 (1 inch).

Oregon: Gardner v. Wright (1907), 49 Ore. 609, 91 Pac. 286, (1 inch); Hough v. Porter (1909), 51 Ore. 318, 98 Pac. 1083, (1 inch); Whited v. Cavin (1909), 55 Ore. 98, 105 Pac. 396, (1 inch); Ison v. Sturgill (1910), 57 Ore. 109, 109 Pac. 579, (1 inch); Porter v. Pettengill (1910), 57 Ore. 247, 110 Pac. 393, (1 inch); Nevada Ditch Co. v. Canyon etc. Ditch Co. (1911), 58 Ore. 517, 114 Pac. 86, (1 inch); In re Willow Creek (Ore., 1914), 144 Pac. 505, (until May 1, 1-40 second feet); In re North Powder River (Ore., 1914), 144 Pac. 486 (1 inch). See also Hedges v. Riddle (Ore., Feb. 9, 1915), 146 Pac. 99.

Washington: Sander v. Bull (1913), 76 Wash. 1, 135 Pac. 489, (1 inch).

Federal: United States v. Conrad Inv. Co. (Mont., 1907), 156 Fed. 123 (1 inch); Rodgers v. Pitt (Nev., 1904), 129 Fed. 932, (1 inch).

[27] Conrow v. Huffine (1914), 48 Mont. 437, 138 Pac. 1094.

[28] Water Rights in the Western States, 3 ed. § 487; 1913 Stat. Nev. ch. 130, § 11.

[29] Nichols v. Hufford (Wyo., 1913), 133 Pac. 1084.

[30] Nichols v. Hufford(supra).

[31] Gerber v. Nampa etc. Irr. Dist. (1909), 16 Idaho, 1, 100 Pac. 80; State v. Twin Falls Co. (1911), 21 Idaho, 410, 121 Pac. 1039; Joyce v. Rubin (1913), 23 Idaho, 296, 130 Pac. 793.

Digitized by Google

varying factors are so many that a uniform standard is impossible, and it depends upon what is reasonable in each case.[32]. In Oregon, where there is a rule adopted by the State Water Board, though no statute, the rule of the board is held not conclusive.[33] How far a distinction will be made between uses begun before and after the enactment of the statute is not established. "It seems to the writer not impossible that the courts will declare that what constitutes waste is a question of fact depending upon the evidence in each case, and not a question of law for declaration by the legislature."[34] This was written ten years ago, and remains still not finally determined, but with the decisions distinctly tending that way.

The decisions as a whole consequently tend very much to establish that the duty of water is a variable, depending upon what the facts prove to be reasonable in each case, in the discretion of the court.

IV.

With this general premise, a question is presented that is being worked over throughout the irrigation country today, namely, how far older users may be confined to less water when time has changed the duty of water in the same locality. Being a variable, the duty of water is not only different in different localities, but may change in the same locality. Pressure from the increased number of users as settlement advanced has caused later users to insist upon a change to a higher duty of water by the older users than the older users had been enjoying. How far a continuance of the older methods will be allowed as "beneficial use" is a matter which the decisions of today find increasingly presented for decision.

When the lessened necessity for water is due to physical changes, pretty surely the quantity which the older user may maintain is affected. If seepage from neighboring irrigation raises the ground water level, for example, affording moisture for the land from other sources, the former amount for surface irrigation will not be required per acre.[35] His older method, resting upon nat-

---

[32] Washington State Sugar Co. v. Goodrich (Idaho, Mar. 3, 1915), 147 Pac. 1073.

[33] Hedges v. Riddle (Ore., Feb. 9, 1915), 146 Pac. 99.

[34] Water Rights in the Western States, 1st ed., page 333.

[35] "After the lower levels are saturated by a few years continuous irrigation such land will require much less water than before and the

Digitized by Google

ural conditions before his neighbors came, had only the uncertainties of nature to contend with; restricted to the new conditions he is exposed to the additional hazard of the conduct of his neighbors; if they cease his needs increase again, yet after being once cut down he could not then increase his taking with the same priority as he began. And in conservative times when fear of the future, with its unknown dangers, makes men give primary concern to holding on to what they have and to being protected therein at all hazards—when safeguarding vested rights is observed with nicety—this unsought hazard will be determinative against restricting the older user to such new conditions.[36] But that is not seriously taken at the present time, which is a time of experimenting and shifting conditions, and in the present temper of the law, it is as though within the maxim *de minimis non curat lex*. There is more attention given to whether the surplus arising from the lessened necessity may be transferred by him to additional or new land of his own or whether he may sell it. The general ruling has been that he may transfer or sell it.[37] But the right to change the point of diversion or place or purpose of use of the surplus or to sell it, once strongly recognized, is more recently losing ground,[38] and there is a tendency to give the surplus to later appropriators adverse to him.[39] A representative ruling is: "If conditions change as times pass, and the necessity for the use diminishes, to the extent of the lessened necessity the change inures to the benefit of subsequent appropriators having need of the flow."[40]

---

same quantity of water may then be distributed over a much larger territory." San Joaquin etc. Canal & Irr. Co. v. Stevinson (1912), 164 Cal. 221, 128 Pac. 924.

[36] See Water Rights in the Western States, 3d ed. §§, 642, 829, concerning the doctrine "injuria sine damno," whereby one may have protection for the security of his right, although no conditions of actual present damage to him exist, and the protection is against the chance or hazard in the future. See also the present writer's note in 2 Cal. Law Rev. 340.

[37] Ironstone Ditch Co. v. Ashenfelter (1914), 57 Colo. 31, 140 Pac. 177; Groo v. Sights (Wyo., 1913), 134 Pac. 269; Water Rights in the Western States, 3d ed. § 510.

[38] See Water Rights in the Western States, 3d ed. §§ 496, 509.

[39] In re North Powder River (Ore., 1914), 144 Pac. 486. Compare Farmers etc. Canal & Reservoir Co. v. Wolff (1913), 23 Colo. App 570, 131 Pac. 291; In re Willow Creek (Ore., 1914), 144 Pac. 505; Groo v. Sights (Wyo., 1913), 134 Pac. 270.

[40] Conrow v. Huffine (1914), 48 Mont. 437, 138 Pac. 1094, 1096.

Digitized by Google

V.

When the change lessening the necessity for water is due not to physical conditions, but to possible advance in efficiency of methods of employing the water, a much more controverted question is presented. The question assumes that the older user is applying the water efficiently under his original methods, and is not wasting any water viewed from that standard, yet a more efficient method had in time become possible.

That there is some degree to which the introduction of advanced practice may be exacted has been recognized repeatedly of late.[41] Of these cases the first and last cited denied the right to complain of a diminution of the head of water in the stream or lake making it impossible to operate the kind of pumps that had been for some time installed there. A method requiring a less head with same efficiency should be installed, it was said. Similarly relief from diversion of underground water supplying a well was denied partly because a change of complainant's arrangements would obviate the damage,[42] and another case says an independent appropriator having a right to take water from a stream may be required to relinquish his point of diversion from the natural channel, and adopt one from the canal of another person.[43] In a Nevada case a certain method of use was shown to be wasteful and the court said: "Such a method of diversion would not be an economical use of water providing another reasonable method, under all the circumstances, could be devised to avoid such loss, even though it occasioned some additional expense to the appropriator."[44] In an Idaho case the court intimated that piping or cementing portions of the ditch may be required of him.[45] In Oregon the court has said that as the demand for water increases, the methods of early settlers must be changed even at considerable expense where more efficiency is possible.[46]

---

[41] Schodde v. Twin Falls L. & W. Co. (Idaho, 1908), 161 Fed. 43, affirmed in 224 U. S. 107, 56 L. Ed. 686, 32 Sup. Ct. Rep. 470; Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038; Doherty v. Pratt (1912), 34 Nev. 343, 124 Pac. 574; Hough v. Porter (1909), 51 Ore. 318, 98 Pac. 1083, 1102; Donnelly v. Cuhna (1911), 61 Ore. 72, 119 Pac. 331; Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666; In re Willow Creek (Ore., 1914), 144 Pac. 505; Salt Lake City v. Gardner (1911), 39 Utah 30, 114 Pac. 147.

[42] Bower v. Moorman (Idaho, Mar. 23, 1915), 147 Pac. 496.

[43] Santa Cruz etc. Co. v. Ramirez (Ariz., 1914), 141 Pac. 120.

[44] Doherty v. Pratt, (1912), 34 Nev. 343, 124 Pac. 574.

[45] Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038.

[46] Hough v. Porter (1909), 51 Ore. 318, 98 Pac. 1083, 1102. In a later Oregon case: "There is no doubt that the methods of irrigation

Digitized by Google

These cases recognize that there may be some situations in which the new methods may be imposed against their will upon older users, and they have been interpreted as marking a new unqualified rule of law that such change may always be imposed on older users. In a previous number of this Review, Mr. Frank Adams, presenting resolutions of the Conference of Irrigation Managers of the United States Reclamation Service differentiating "beneficial use" from "economical use," and placing them beside the decisions, shows the tendency both among irrigation managers and courts to declare for "the highest and greatest possible duty."[47] But they are not unqualified. The resolutions declare for a "reasonable" maximum of good with a "reasonably" economical handling of the water, and that the older user adopt every "reasonable" method to reduce the amount of water, and that he make "reasonable" preparation of the ground, and prepare "reasonably" efficient dikes, ditches and structures, and that there be a "reasonable degree" of perfection; they are not unqualified, but continually assert that how far they would go in enforcing innovations is a question of degree, according to what is "reasonable" in each case. And the same qualification as the irrigation managers advocate is recognized in the judicial opinions also. The Supreme Court of Oregon, which at times has been one of the most emphatic in expressions directed to change of method by the older users, also says: "While the crude and wasteful manner of irrigating must be replaced by modern economical methods, yet the ancient means for applying water is not a reason for forfeiting the right to a sufficient amount of water to irrigate the land in a proper manner."[48] In a California case the matter was directly presented and

---

in Eastern Oregon have not been so economical as to obtain the best results with the least amount of water, and when conservative methods are adopted it may be found that much less water is necessary than has generally been used. In many cases which have been presented to the courts the testimony has tended to establish, and the courts have allowed, for the average soil, such as loam, clay, or sagebrush land, one inch to the acre. In a few cases where the soil has been gravelly or upon a gravelly subsoil as much as two inches to the acre has been contended for and allowed. This has been based on the testimony as to the need, when used under the ordinary methods then in vogue, in which little attention was paid to systematic or economical application of the water. It is the policy of the law that the best methods should be used and no person allowed more water than is necessary, when properly applied, and thus a larger acreage may be made productive by its extended application." Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666.

[47] The Economical Use of Water, 2 Cal. Law Rev. 367.

[48] In re Willow Creek (Ore., 1914), 144 Pac. 505.

Digitized by Google

considered and it was held very strongly that continued use of water that could be reduced by better methods gave no right to the excess; but at the same time it was recognized that it was a question of what was "reasonable" in each case; and if the water was actually used the presumption would be that there was no excess, and the burden of proof was on the party contending that the methods should be improved.[49] In an analogous California case the Court of Appeal held, after much discussion, that the claimant could be made to cement its canal, and the Supreme Court recognizes that this may be so. But it decides that this is a question of fact depending on the circumstances and may or may not be so, and no fixed rule can be laid down. It depends, the court says, upon what is reasonable upon the facts presented in each case.[50] This qualification runs through most of these decisions.

It has been thought that there is a conflict between these decisions and certain others which recognized the custom of the locality and declined to exact a higher efficiency than custom had generally established. But there is no conflict. The custom of the locality has always been an important factor entering into what is reasonable in each case. In exercising a discretion as to what is reasonable in the case presented, the courts cannot discriminate

[49] "In determining how much of the water in fact used had been reasonably necessary for the purpose for which it was used, we believe that a court should be liberal with the appropriator to the extent at least that it should not deprive him of any portion of the amount of water that he had in fact used for the period necessary to gain title by prescription, unless it is clearly and satisfactorily made to appear that he has used more than was reasonably necessary. The presumption would appear to be in his favor, for ordinarily one would not take the pains to use upon any land more than was reasonably necessary under all the circumstances. But we are of the opinion that the findings in this case have designedly been made to present the question of the use by defendant of water not reasonably necessary for the purposes for which it has been used, such a use, as in our view of the law, amounts to waste." California Pastoral etc. Co. v. Madera Canal etc. Co. (1914), 167 Cal. 78, 138 Pac. 718.

[50] "There is considerable discussion in the opinion of the district court with respect to the claim of respondent that the plaintiff should be required to cement its canals and to prevent waste by seepage. Its purport on this point is not as clear as could be wished. Inasmuch as the case is remanded for a new trial and these questions are thereupon to be determined by the court below, without a jury, we think all of the discussion on that subject would better have been omitted and we deem it advisable to declare that nothing said about them in the opinion is to be regarded, on the new trial, as the law of the case, and that the court below be left free to decide the case unhampered in this respect. They are questions of fact to be decided in each case upon all the circumstances. No unreasonable expense should be imposed upon the public service company." San Joaquin etc. Canal & Irr. Co. v. Stevinson (Cal. Mar. 10, 1915), 147 Pac. 258; see also 147 Pac. 254.

Digitized by Google

against those who happen to be parties to any suit, leaving the rest of the community to pursue the old methods. Nor would it be supposed that the law ought to take the position that a man, being a member of society, should be required to so use his land as to confer the greatest benefit upon the greatest number of other people without consideration of what is reasonable to himself, and should change his methods of tilling or forfeit his estate to his neighbors. Judge Hawley, whose opinions have held a high place in the law of waters, ruled: "The contention that the prior appropriators of the water ought to be compelled to change their system for the exclusive benefit of subsequent appropriators, who use the same system, does not appeal, in the light of all the facts in this case, very forcibly to a court of equity as being sound."[51] In a recent federal case[52] a contention by the United States Reclamation Service that such change should measure the existing users' rights so as to permit a subsequent appropriation out of the surplus thereby squeezed out of the older users, likewise failed.[53] Likewise in Oregon, after full consideration, it was ruled that great expense cannot be demanded of older settlers on small tracts to make them conform to a younger standard of efficiency.[54]

If the method is the customary one in the locality, courts of justice in other connections as well as this have always regarded custom as a specially important factor in determining as a question

---

[51] Rodgers v. Pitt (1904), 129 Fed. 932, 943.

[52] United States v. Bennett (Wash., 1913), 207 Fed. 524.

[53] "But we know of no law requiring the appropriator of water to change his system of husbandry to conform with some other system where less water is required. In other words, we know of no law requiring the defendants in this case to cease diverting water for the irrigation of alfalfa or other forage crops heretofore grown on their land and compelling them to reduce their diversion to that required for an orchard or other use requiring less water; nor do we know of any law requiring them to reduce their appropriation of water to the quantity required for a less gravelly and porous soil simply because there is better soil in the neighborhood requiring less water. What is required of the appropriator is that he shall not waste the water appropriated but shall put it to a beneficial use in accordance with the requirements of the husbandry in which he is engaged. In our opinion the decree of the court below conforms to such requirements. The decree is therefore affirmed." United States v. Bennett (Wash., 1913), 207 Fed. 524. See also Nephi Co. v. Vickers (1907), 29 Utah, 315, 81 Pac. 144.

[54] "In this case we have a large body of land which has been irrigated almost a lifetime. These older settlers took advantage of the United States statute of 1866, authorizing settlers to acquire title to the use of water in this manner, and they have secured it, at least to the amount needed and used, and now an effort is being made to reduce the amount to which they supposed their title was perfect. Their methods of use have been those which were the least expensive, and,

Digitized by Google

of fact what is reasonable in any case between members of the community. Yet it is not in itself conclusive, nor did these cases say it was; the case is viewed in the light of all the facts, of which custom is but one. These cases were proceeding upon the same line as the others, namely, the court was exercising a discretion as to what was reasonable upon the facts presented. The law has taken a position between either extreme and follows the middle course.

So that how far the older user may, at peril of forfeiture, be forced to keep "up to date" is being recognized as a question of degree, resting in the court's discretion as to what is "reasonable," and a question of fact in each case. He may or may not be forced to do so, according to the particular features of each case, the custom of the locality and the expense of the change being features to be considered with the rest.

VI.

Investigation is developing a scientific "technique" of irrigation. It is demonstrated, for example, that water should be placed six to nine inches below the soil surface and soil mulches of varying thickness should be applied to minimize evaporation losses; fewer and deeper furrows should be used; earlier cultivation should begin, especially in heavier soils, where the percolation is slow and surface moisture content high; cement lining should be put into canals and ditches.[55] These are but instances of the knowledge being gathered upon the scientific details of irrigation by the experts and investigators.

---

no doubt, to some extent were extravagant, yet they cannot be expected to install methods now that might reduce to a minimum the amount of water necessary, at a cost that would absorb the profits. A great saving in the amount of water may be possible by adopting the Government Reclamation Service methods (cited as authority here) of cement ditches, to prevent both seepage and evaporation, with experts to follow up and apply the water, by which it is contended that a half inch to the acre is sufficient; but at this time it is to some extent an experiment whether the investment on that basis will be remunerative, at least on the small farms. Furthermore, these government projects are for a new and original use of water, upon which the government can impose such terms as it may see fit. Here the users have acquired the land and applied the water, which are valuable under present conditions, and their rights therein are vested, and we can require them only to use the water economically and reduce the quantity to a minimum by reasonable and cheap methods according to their situation and condition." Little Walla Irr. Union v. Finis Irr. Co. (1912), 62 Ore. 348, 124 Pac. 666.

[55] "This demand requires the water user: (a) to make reasonable preparation of the ground surface for irrigation; (b) to use good judg-

Digitized by Google

But education in the application thereof must go to the farm before that knowledge can come into court with unqualified authority. As between the rule, above indicated to be the law, leaving the degree of improvement to what the court, from all the facts in proof, finds a reasonable requirement in each case, and another (which, as also above indicated, no one advocates) exacting the highest possible efficiency known to science in all cases, it is easy to see which would survive in the struggle for law.

It still seems true, therefore, of "beneficial use," as a rule of present law, that "the question is one of fact, a very general one, depending upon the attitude which the jury (or judge) as reasonable men, will take toward the evidence as a whole." And from the decisions of the last four years it appears that the question of fact is whether the use is a reasonable use between the parties under the circumstances in each case according to the court's best idea of fairness to all. The transmission allowance appears as whatever is proved reasonable in degree; the duty of water at the land is whatever the facts prove to be reasonably required; whether change to a higher duty must be made depends in each case upon whether it can be reasonably done with fairness to all parties; and together these factors determine the ultimate fact of "beneficial use." The discretion of the court remains the increasingly important element, determining what is "reasonable" in each case according to the facts proved, subject to appeal in case of clear abuse of discretion. The law requires that degree of efficiency by the appropriator which the court, after hearing all sides and seeking to be fair to him not less than to the other parties, believes it is reasonable to require of him.

It is evident that a tendency, so active elsewhere in the law, is coming to be reflected here also. Another instance was considered by the present writer in reference to decisions which decline to give full effect to any priority that is considered "un-

---

ment in selecting appropriate methods of applying the water to the ground; (c) to prepare reasonably efficient dikes, ditches and structures to get the water over the land in such a way as to reduce the underground losses to a minimum; (d) to irrigate with such a head and at such intervals as to require a minimum use of water for proper irrigation; and (e) to cultivate the irrigated ground when practicable to prevent undue losses from evaporation; in some cases possibly to govern the character of crops to be grown." Resolution 67 of the Conference of Irrigation Managers of the U. S. Reclamation Service, quoted in 2 Cal. Law Rev. 373.

Digitized by Google

reasonable,"[56] and the likeness of that to the present tendency to resort to reasonableness in determining the allowances and restrictions surrounding "beneficial use" has been pointed out by another in a previous number of this Review.[57] As this discretionary feature increases, the test between appropriators is becoming increasingly like the test at common law between riparian owners; namely "reasonable use," which means that consumption of the water between the members of either class among themselves is subject to the power of the court to apply its ideas of fairness in each case. The idea of a definitely fixed segregation of quantity for each appropriator unvarying forever is not holding its own, and the amount of water he may have becomes subject to variation from time to time according to variation in the conditions that surround him (as it likewise varies between riparian owners at common law), and subject to the fairness of the court (as opposed to fixed rule) apportioning the use between the parties.

"Reasonableness" as a test lies in many districts of the law. There is the level valley where "reasonable care" governs the law of negligence and "reasonable time" plays a large part in the law of contracts; from there we pass to the foothills where "reasonableness" of rates and service governs the law of public service companies; some stations on we reach the snow-line where "reasonable restraint of trade" ("light of reason") agitates the law of trusts and monopolies. All these but mean that it is a question of degree, resting upon the discretion of the authority that is to decide. And discretion carried to the end becomes personal government, and we get off at the very summit where we fight for a government of laws and not of men.

But the "beneficial use" matter does not yet take us out of the placid valley, and let us hope that it will learn to stay there.

Samuel C. Wiel.

San Francisco, California.

---

[56] Water Rights in the Western States, 3d ed. § 310; 18 Yale Law Journal 189; 27 Harv. Law Rev. 530.

[57] The Economical Use of Water by Mr. Frank Adams, 2 Cal. Law Rev. 367.

Digitized by Google

The United States and Woo Wai

THE most captivating subject of study in the curriculum of a law school novice is Criminal Law. The element of human interest is so strong that the normal, healthy youth whose hair splitting proclivities are yet undeveloped foresees a spectacular career in a law practice offering the inducements of fame, fortune, thrill and mystery.

After a few semesters spent in arguing upon principle and demolishing the reasoning of mere jurists presented in decisions of legal problems, no matter how abstruse, there comes a change. This academic sport—an iconoclastic debauch, leaving scattered on the wayside the fragments of judicial monuments—generally ousts the ambition first engendered in favor of the anticipated joy of counselling great industries and driving twin-sixes through the loop-holes left open by legislatures of lesser mentality.

The first plunge into practical experience, however, leaves nothing in the breast of the explorer of digests but the fervent hope that whether the subject in hand sound in tort or contract, somewhere there may be a case in point. His constant prayer is that chance may guide his numb fingers to the key-number where, behind a syllabus, his quarry is concealed.

It would come as a taste of earlier joys to find a real, live case arise, presenting a question which was the subject of discussion in many meetings of the class in Crimes and perhaps a bone of fierce contention in a session of the moot court. Such is the case of Woo Wai.

Zealous government officials into whose keeping the administration of criminal statutes is confided frequently run to extremes. So it happened that a federal committee of inquiry into the Immigration Department of the United States, suspecting that Woo Wai, a Chinese merchant in San Francisco, had knowledge of internal irregularities at that port, conceived the plan of inducing him to commit crime and then using the offense as a means to compel him to divulge his information. The committee employed a detective; they chose their man well. Posing as the genial restaurateur of Van Ness Avenue, when that thoroughfare enjoyed its brief after-the-fire popularity, he had become the

Digitized by Google

confidant of the city fathers. Under his hospitable roof the bribe-money had passed, thereby laying the foundation for the famous graft prosecutions.

So the detective became a jeweler in the oriental end of Kearny Street. Through a leading Chinese editor and free-mason he procured an introduction to Woo Wai. Soon their families became closely acquainted, holiday gifts were exchanged, and the Chinese merchant of thirty years good standing in the community felt that he had made a staunch and sincere friend.

It is not surprising, then, that the suggestion that Woo Wai accompany him to San Diego on a matter of business was instantly accepted. The nature of the enterprise was not disclosed, but its certainty to produce large returns was assured. The theater of action was cleverly chosen. Assuming Woo Wai's acquaintance with questionable practices at San Francisco, it would never have done to stage the play there. So with government money Woo Wai was conducted south, entertained at Los Angeles, and then at San Diego. Here he was introduced to the immigration inspectors in charge of the Mexican border and the purpose of the journey was explained. It was proposed that Woo Wai should procure the introduction of Chinese coolies from Mexico, and that the inspectors would facilitate their entry for a consideration of fifty dollars per head. Woo Wai was disposed to reject the proposition, but was reassured by the statement of the officials that they were in absolute control and that neither detection nor arrest need be feared from other sources.

Any casual student of the political history of China is at once impressed with the custom there prevailing that the government official is the government itself—a custom of such long standing that it has become a tradition and is, of course, profoundly reflected in the intelligence and conscience of the Chinese race. So Woo Wai promised to consider the matter. After two years of constant prodding by the detective and the government inspector, both in person and by correspondence, arrangements were made by Woo Wai and his friends for the importation of Chinese. A small party was started from Ensenada under convoy of Mexican guides. The scene was set; the officers were ready to apprehend the contrabands. The play descended into farce; for when the inspectors sought to swoop down upon their prey the Chinese, having pursued a devious route, could not be found.

Digitized by Google

It was nervous business. Woo Wai was disposed to stop. He journeyed to San Diego to pay the price. His expenses had been larger than contemplated and the inspectors with magnanimity relinquished a portion of their fee. The pieces of gold which they received were later wrapped in paper, sealed, and afterward produced at the trial in the original package.

The inspectors used the occasion to stimulate Woo Wai's waning enthusiasm in the enterprise, so that he was induced to import a second group. This time the officers were more circumspect. The coolies were caught and Woo Wai and his partners were soon after indicted upon various counts for smuggling, bribery, and conspiracy against the laws of the United States.

It is not known whether Woo Wai refused to yield the desired information or knew nothing of value. At any rate, one of the indictments was brought on for trial in the United States District Court at Los Angeles. In the language of the inspector who testified for the government, the purpose was "to get a hold on Woo Wai in order to obtain information." As a member of the committee of inquiry wrote from the Fairmont Hotel to the inspector referring to Woo Wai, "Use him yourself for all he is worth."

The defendants took the stand in their own behalf. With a few exceptions, their story coincided with that related by the officers. The trial judge instructed the jury that the conduct of the government officials was no defense. The verdict accordingly was "guilty." Upon writ of error in the Circuit Court of Appeals the judgment was reversed.[1] The court, speaking through Circuit Judge Gilbert, held:

> "We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so in the decision in People v. Mills, 178 N. Y. 274 . . . . But it is to be said by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the

[1] Woo Wai v. United States (May 3, 1915), 223 Fed. 412, 415.

Digitized by Google

> commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of criminal act came from the officers of the government. The whole scheme originated with them."

While not as clearly defined as it might be, a distinction has been created by the authorities in the law of entrapment. Crime is in itself naturally clandestine, and it is therefore necessary, in order to detect the criminal in the act of wrong-doing, that decoys be laid, or even that government officers pretend to participate in the transaction. While there is some authority to the effect that in such a case a conviction will not be permitted, it seems that the weight of judicial decision is to the contrary. Among the latter are the numerous cases in the federal courts where, for example, crimes against the postal laws have been committed in response to decoy letters. On the other hand, where there is no criminal activity which calls forth the effort to detect by means of decoy and where the conduct of the official goes farther than a mere inquiry to determine whether the suspect is ready and willing to break the law—where, in fine, the representative of the government approaches a person innocent of crime or criminal intention and by persistent effort and tempting promises undermines the integrity of the victim and ultimately procures him to commit a crime—the conduct of the official is abhorrent to the sense of decency and justice, and the government which has conferred the authority so viciously abused by the agent should not be, and is not, permitted to disavow the agency and to obtain a conviction. This is the radical distinction. Where one private individual induces another to commit a crime, this affords no defense to the criminal. This same theory underlies many decisions involving the entrapment of a suspected criminal where the detective does not disclose his official capacity and the suspect does not act under the assurance that the participation of the government's representative will afford security. It is difficult enough for the human conscience, unaffected by such influences as those brought to bear upon these Chinamen, accurately to distinguish between the confines of right and wrong. So it seems just and proper that the defendants in the instant case should not have been branded as felons because they were not strong enough to withstand the attractive, though nefarious, partnership which the entire Department of Immigration held out to them. The branch of the executive function of the government known as

Digitized by Google

the Department of Justice was not permitted to disavow the conduct of another branch known as the Department of Commerce and Labor and to secure the conviction of men who, theretofore innocent of wrong, were induced by the latter's initial suggestion and frank co-operation to offend against the law.

The opinion of the court does not distinguish between a case of the kind at hand and those of burglary and larceny where the inducement or co-operation of the owner of the property stolen is frequently held to deprive the act of criminal taint. The decision in the instant case is, however, in accord with the great weight of authority.[2]

In both the Grimm and Goldman cases, convictions were upheld, but in the former it was said:

> "It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." And in the Goldman case it was stated:
>
> "If these officials adopted and pursued this course upon reasonable grounds to suspect Goldman of misusing the mails, their conduct was, under well-settled principles, justifiable, and the offense was committed; if no such grounds existed, neither their course nor the conviction can be sanctioned. . . .
>
> "The evidence tends to justify the course taken by the post office officials; in other words, it seems to have been an effort to detect, and not to induce commission of a crime."

There is one feature of the instant case which the court does not discuss, and in which the situation presented bears resemblance to cases of larceny and burglary where the owner has consented to the taking. The government wanted to get a hold on Woo Wai. This was a governmental purpose which did not alone concern the making of a criminal. For the principal motive was to obtain information which the government believed could be elicited from this Chinaman. The matter thus concerned one of its administrative departments. To induce Woo Wai apparently

[2] Grimm v. United States (1895), 156 U. S. 604, 39 L. Ed. 550, 15 Sup. Ct. Rep. 470; Goldman v. United States (Feb. 2, 1915), 220 Fed. 57; United States v. Healy (1913), 202 Fed. 349; People v. Braisted (1899), 13 Colo. App. 532, 58 Pac. 796; Wilcox v. People (1902), 17 Colo. App. 109, 67 Pac. 343; Scott v. State (Tex., 1913), 153 S. W. 871; De Graff v. State (1909), 2 Okla. Cr. 519, 103 Pac. 538; Moss v. State, (1910), 4 Okla. Cr. App. 247, 111 Pac. 950; State v. Smith (1910), 152 N. C. 798, 67 S. E. 508; State v. Hopkins (1911), 154 N. C. 622, 70 S. E. 394; State v. Lucas (1902), 94 Mo. App. 117, 67 S. W. 971; Davis v. State (Tex., 1913), 158 S. W. 288; O'Halloran v. State (1860), 31 Ga. 206.

Digitized by Google

to break the law was a means to a governmental end — a link in the devious chain which it saw fit to forge as a proper method of checking up the efficiency and integrity of the Immigration Department. The law which the United States procured Woo Wai to break was a mere administrative regulation. No criminality was inherent in the act itself; there was no *malum in se*. The theories underlying the exclusion of one class of Chinese and the admission of another may be ethically unsound and unjust. Nevertheless, the United States government had determined that it should be so and that determination was final. But it designated certain men whose sole office was to maintain this arbitrary regulation, to prevent violations and to apprehend violators. These men ranked from the cabinet officer to the inspector. Their conduct in the premises was, regardless of the motive that impelled it, an administration of the law of the United States and the convictions which induced their action were conclusive in the matter. When the government seeks to obtain a conviction upon these facts should it not be held to be concluded by the conduct of its agents? Should it be permitted to disavow the activity of its officials in making criminals of these Chinese and nevertheless obtain a conviction upon the basis of the testimony of these same officials who went upon the witness stand not as conspirators—this suggestion was vehemently repudiated by counsel for the government—but as inspectors still pursuing their employment as such in an effort to make felons of the men whose apparent offense they had already induced?

The conviction was held improper for another reason which bids fair seriously to trammel the normal activity of the United States secret service. It was held:

> "First, the facts as testified to by the defendants, and as supplemented by the evidence for the United States, fell short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440. It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border that the law should not be violated. They intended to prevent the consummation of the offense which they lured the defendants to undertake. Their purpose was to intercept the Chinese so brought across the border, and return them to the country whence they came. Woo Wai and his associates, therefore, although they were not aware of the fact, were engaged in an act which was not to result in an accomplished offense against the laws of the United States."

Digitized by Google

In every case in which detectives, learning of a contemplated crime, participate in the proceeding they intend that no actual breach of the law shall be effected. It will therefore be interesting to see how far this court will be ready to extend the principle so announced and whether it will be given application in a case in which the criminal purpose originated in the mind of the accused and his guilt is otherwise plain.

It is worthy of note that upon application by the United States attorney for the district in which the indictment was found the Attorney General refused to petition the Supreme Court of the United States for a writ of certiorari. Thereupon the Departments of Justice and of Immigration recommended a dismissal of all the pending indictments against the Chinese. Such proceeding was accordingly taken.

David Livingston Levy.

San Francisco, California.

Digitized by Google

California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $2.50 Per Year **Single Copies, 50 Cents**

ORRIN K. McMURRAY, Editor-in-Chief
J. D. RINEHART, Student Editor-in-Chief
M. C. LYNCH, Business Manager
S. F. HOLLINS, Assistant Business Manager

Faculty Board of Editors

A. M. KIDD
WM. CAREY JONES
WM. E. COLBY
M. E. HARRISON
A. P. MATTHEW
M. C. LYNCH
J. U. CALKINS, Jr.

Student Board of Editors

V. M. AIROLA
ESTO B. BROUGHTON
JACOB GOLDBERG
H. S. JOHNSON
H. L. KNOOP
J. S. MOORE, Jr.
MATT WAHRHAFTIG
G. W. WORTHEN

EDITORIAL NOTES

MEETING OF THE CALIFORNIA BAR ASSOCIATION

THE sixth annual meeting of the California Bar Association was held in San Francisco from the 23rd to the 25th of August. The session closed with a notable banquet, at which ex-President Taft was one of the speakers. The meeting as well as the banquet will be remembered by reason of the presence of a large number of visiting members of the American Bar Association as guests.

Digitized by Google

One of the most important pieces of work undertaken by the association for the succeeding year was entrusted to a committee of which Mr. A. E. Bolton, of San Francisco, is chairman. This is the consideration of the possibility of simplifying procedure by a radical change of system. The work that has been done and is now being done in New York and other states gives rise to the hope that something may be achieved in that respect on this side of the United States. The legislation in respect to a simplification of appellate procedure upon which the Commonwealth Club and the California Bar Association, together with some of the local bar associations, worked for years, has at last been adopted, and is now in force as law, owing to the untiring efforts of these organizations. To have accomplished even this reform, in view of the prevailing attitude of indifference both on the part of the public and of legislatures toward improved efficiency in judicial administration and in private law, gives promise of some sound legislation on these matters in the future. It may even be hoped that at some not impossibly remote date, California may adopt the Uniform Negotiable Instruments Act and secure a proper system of examinations for admission to the bar. The California Bar Association, which has always stood for these measures, is one of the strong and enduring influences in the permanent betterment of the state through intelligent reforms such as those just mentioned.

The Editor takes this occasion of acknowledging the high compliment paid the California Law Review by the vote of approval of the Association and of thanking the retiring President for his kind words of appreciation concerning the Review and its work.

Mr. Eugene Daney, of San Diego, was elected president of the association for the year 1915-1916. Mr. T. W. Robinson, of Los Angeles, remains the secretary.

Digitized by Google

School of Jurisprudence Notes

THE regular work of the School of Jurisprudence commenced on the 17th of August. One hundred and fifty-nine students enrolled in the professional courses, an increase of thirty-two over the attendance of last year. The most noticeable change is in the second year class, which has increased from thirty to forty-eight.

There has been a marked change in the attitude of the students in the University who are preparing to enter the professional law work. At the opening of the present term there was formed an organization of students who were interested in discussing problems connected with the necessary academic preparation for the study of law. The society as at present constituted includes the members of the freshman class in the University. The plan of the organizers is to include succeeding classes which enter the University and to embrace in the membership all intending students of law who are registered in the freshman, sophomore, and junior years.

It has not been deemed advisable to prescribe a formal University course for those who are preparing for the professional course of the School of Jurisprudence, but for a number of years the annual announcement of the School has contained suggestions for preliminary University work. After pointing out the importance of pursuing a systematic course in history, economics, political science, and the classics, it has been the aim of the faculty to impress upon the student the following fact: "Whatever direction the student's pre-legal training may take, whether in history, letters, pure science, or applied science, the importance cannot be too strongly impressed upon him of pursuing systematic and thorough courses in one or two departments rather than of making a curriculum of fragmentary and unrelated subjects in a number of departments."

During the last few years under a system of faculty advisers for freshmen this fact was conveyed directly to each individual as he registered in the University for the first time. Last year at an informal conference of faculty and second and third year students in the School it was ascertained that the intending students of law were inclined to follow the line of least resistance and to be satisfied with accumulations of credits from fragmentary and unrelated subjects. To add further emphasis to the at-

Digitized by Google

tempts made to correct this tendency a general meeting of pre-legal students entering the University was called during the first week of the term. When so assembled and after a discussion of the methods of pre-legal study by members of the faculty and some of the regular law students, the freshmen on their own initiative organized a society for the purpose of keeping up within the class an interest in these problems. It is the aim of this society to discuss general matters pertaining to pre-legal education. It is to be kept entirely distinct from the Law Association, the organization of the students enrolled in the professional courses.

A change has been made in the moot court work of the School. Heretofore there were several moot courts and the work was voluntary on the part of the students. Under the present plan the work is compulsory for first year men. In each of the ten courts there are eight of these beginners with a number of second and third year men. Each first year student prepares and argues four cases during the year. The work is in charge of the third year students and a committee from the faculty.

The annual address before the California Bar Association was delivered by Professor O. K. McMurray on August 24th. His subject was, "Changing Conceptions of Law and of Legal Institutions." Professor McMurray also spoke before the International Congress of the National Education Association in Oakland on August 27th on "Some Defects in Our Legal Education."

M. C. L.

Digitized by Google

Comment on Recent Cases

BANKS AND BANKING: MEASURE OF DAMAGES FOR WRONGFUL REFUSAL TO HONOR DEPOSITOR'S CHECK.—What is the measure of damages for a bank's wrongful refusal to cash its depositor's check? In the recent case of *Hartford v. All Night and Day Bank*,[1] it was held that substantial damages were not recoverable, and that section 3302 of the California Civil Code states the full measure of damages in such a situation.

In the case referred to, Hartford drew a commercial check upon the defendant bank in which he had only a savings account. The check was returned marked "no account," and Hartford was arrested for passing a worthless check, pursuant to section 476a of the Penal Code making such act a felony. In the present action he alleged great damage to his credit and reputation, and recovered judgment for twelve hundred and fifty dollars in the lower court. The Supreme Court reversed the decision of the lower court, holding that because of the nature of the account upon which the check was drawn and the usual rules governing such accounts, the bank had not been guilty of any negligence. The case is undoubtedly correctly decided upon this ground. The court, however, also rests its opinion upon the proposition that the damages recoverable are governed by section 3302 of the Civil Code, to the effect that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon.

The common law is, unquestionably, that for such a wrongful refusal on the part of a bank, depositors may recover substantial damages.[2] The liability arises not alone for breach of the implied contract on the part of the bank to pay depositor's checks, but also depends on the tort committed against him.[3] It is somewhat analogous to the recovery of an injured passenger against a common carrier.

The weight of authority in this country follows the common law rule.[4] The recovery is based rather on the tort liability than on any contractual breach. Loss of credit and injury to reputation are deemed the proximate results of the bank's act. In sup-

---

[1] (June 30, 1915), 50 Cal. Dec. 49.

[2] Rolin v. Steward (1854), 14 C. B. 595, 78 Eng. C. L. 595.

[3] Marzetti v. Williams (1830), 1 B. & Ad. 415, 20 Eng. C. L. 541.

[4] Lorick v. Palmetto Bank & Trust Co. (1906), 74 S. C. 185, 54 S. E. 206; Columbia Nat. Bank v. MacKnight (1907), 29 App. Cas. (D. C.) 580, 10 Ann. Cas. 897; Commercial Nat. Bank v. Latham (1911), 29 Okla. 88, 116 Pac. 197; Patterson v. Marine Nat. Bank (1889), 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Schaffer v. Ehrman (1891), 139 Ill. 670, 28 N. E. 917.

Digitized by Google

port of this, it is pointed out that checks passing through the clearing house dishonored leave their drawer's name in bad repute. Furthermore, a broad ground of public policy enters into the decisions of such cases.[5] Banks manage and control the finances of the country, and owing to their quasi-public nature must be held to strictly accurate management of their business. The great importance of having business free from any obnoxious mismanagement by banks demands that for any mistakes in refusal to honor valid checks, the banks must be responsible in a substantial amount to the person injured. Even such recovery may be had on theory of breach of contract, the ordinary rule of damages being outweighed by the public policy demanding proper banking facilities.

In respect to the view point of our own courts, the very well considered case of Simonoff v. Goodman Bank[6] expressly held that Section 3302 of the Civil Code was not controlling in such an action and permitted recovery of substantial damages. After pointing out the inequitable result which would obtain if this section were to state the measure of damages, the court goes on to say, "Is it possible that Section 3302 can be meant to take away a right universally conceded to exist elsewhere?" The answer that the court came to was that it did not. Proceeding under the section regulating code interpretation,[7] the section was held applicable to contract relations exclusively.

In the present case, having pointed out that the liability is chiefly in tort, is it not reasonable that this section should not be allowed to state the full measure of damages? The code section regulating damages recoverable for a tort would seem to be equally, if not more, in point.[8] Furthermore it is submitted, the code should not be taken as the only law on this question.[9] Though the code establishes the law respecting the subjects to which it relates, it is not necessarily the only law on those subjects.[10]

All things considered, it is submitted, the better view to assume is that Section 3302 does not state the full measure of damages in these cases and that substantial recovery should be allowed where negligence is shown on the part of a bank in dishonoring its customers' checks.

C. A. B., Jr.

---

[5] Hilton v. Jessup Banking Co. (1907), 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224, 10 Ann. Cas. 987; Spearing v. Whitney-Central Nat. Bank (1911), 229 La. 607, 56 So. 548; Patterson v. Marine Nat. Bank (1889), 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. Rep. 778.

[6] (1912), 18 Cal. App. 5, 121 Pac. 939.

[7] Cal. Code Civ. Proc. § 858.

[8] Cal. Civ. Code, § 3333.

[9] Peters v. Peters (1909), 156 Cal. 32, 36, 103 Pac. 219; Cal. Pol. Code, § 4468.

[10] Arzaga v. Villalba (1890), 85 Cal. 191, 24 Pac. 656.

Digitized by Google

CONFLICT OF LAWS: ACTION FOR WRONGFUL DEATH.—To be obliged to pay twice for a death caused by negligence is the result of the decision in the case of *Spokane and Inland Empire Railway Company v. Whitely*.[1] While a passenger on the railroad company's train in Idaho, A. P. Whitely was killed by reason of its negligence. He left a wife and a mother, the former of whom was appointed his administratrix in Tennessee, the decedent's domicil. Under the law of Idaho, action for wrongful death could be brought by the personal representative only with the authorization of the heirs of decedent. The railroad company, without reference to the law of Idaho, entered into an agreement of compromise with the wife, the domiciliary administratrix, and subsequently paid the latter under a judgment obtained against them in Washington the full amount agreed on in the compromise. The mother, never having authorized the settlement, proceeded with an action against the railroad company in Idaho as one of the heirs of the decedent for the damages sustained by her by reason of their wrongful act. The latter pleaded in bar the judgment obtained against it in Washington. This defense was overruled,[2] and the company obtained a writ of error from the Supreme Court of the United States on the ground that full faith and credit was not given to the decree of the Washington court.

By the provisions of the federal Constitution[3] and the laws passed in pursuance thereof,[4] a judgment obtained in one state must be given the same force and effect in every other state of the Union that it would have in the state where rendered.[5] But a judgment to be valid must be rendered by a court having jurisdiction over the parties; if, therefore, the court of Washington dealt with the rights of parties over whom it had no jurisdiction, it must be held that its judgment had no force and effect as to them even in Washington.[6] That the mother was not before the Washington court in person was admitted, but it was contended that she was represented by the administratrix. Whatever right anybody might have to sue was given entirely

---

[1] (May 17, 1915), 35 Sup. Ct. Rep. 655.

[2] Whitely v. Spokane etc. R. R. Co. (1913), 23 Idaho, 642, 132 Pac. 121.

[3] U. S. Const. art. 4, § 1.

[4] U. S. Rev. Stats. § 905.

[5] Perrine v. Slack (1896), 164 U. S. 452, 41 L. Ed. 510, 17 Sup, Ct. Rep. 79; Carpenter v. Strange (1891), 141 U. S. 87, 35 L. Ed. 640, 11 Sup. Ct. Rep. 960.

[6] Haddock v. Haddock (1906), 201 U. S. 562, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525; Fauntleroy v. Lum (1908), 210 U. S. 230, 52 L. Ed. 1039, 28 Sup Ct. Rep. 641.

Digitized by Google

by the statute of Idaho,[7] as the tort was one not recognized at common law.

In whatever forum, the *lex loci delicti* must be followed in an action founded on a statutory tort.[8] Among the matters thus governed by the *lex loci delicti* is the question of proper parties plaintiff in an action for damages for wrongful death.[9] By the *lex loci delicti*, Idaho, the heirs or the personal representative are the proper parties plaintiff, and this statute and other statutes in this form have been interpreted to mean that the personal representative of the deceased, to be the proper party plaintiff, must have the authorization of those beneficially interested.[10] As this authorization was not given in the present case, and the defendant in error was not before the Washington court through a representative, the latter court had no jurisdiction to determine her rights. The Washington judgment as to the defendant in error having been given by a court without jurisdiction, is of no force and effect and is binding on no court.[11]

While it is hard that the railroad company must pay twice, the result was occasioned through its own carelessness, since no attempt was made to call the attention of the Washington court to the proper law to apply.[12] Of course it is possible that the Washington court, even if directed to the proper law, might have erroneously applied the *lex fori*. In such a case the company would meet the same unpleasant result without any fault on its own part but as this case was not presented, no comment is called for save to suggest its possibility. Evidently plaintiff in error felt that it was safe behind a judgment, as indeed it would have been, had not the judgment obtained been without force and effect as to the defendant in error. The railroad company might have avoided all difficulty had it procured the assent of the mother to the compromise in Tennessee.

R. S. M.

---

[7] Minor on Conflict of Laws, §§ 200, 202; Dennick v. Central R. R. Co. (1880), 103 U. S. 11, 26 L. Ed. 439.

[8] Carter v. Goode (1888), 50 Ark. 155, 6 S. W. 719; Le Forest v. Tolman (1875), 117 Mass. 109; 33 Ann. Cas. 719, note.

[9] Wooden v. Western etc. R. R. Co. (1891), 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803; 13 L. R. A. 458; Limekiller v. Hannibal etc. R. R. Co. (1885), 33 Kan. 83, 52 Am. Rep. 523; Lower v. Segal (1896), 59 N. J. Law 66, 34 Atl. 945.

[10] Copeland v. Seattle (1903), 33 Wash. 415, 74 Pac. 582; Koloff v. Chicago etc. R. R. Co. (1913), 71 Wash. 543, 129 Pac. 398; Cal. Code Civ. Proc. § 377 has been held by the California courts to give the right of action to the personal representative, as trustee for the heirs. His recovery, therefore, relieves the defendant from further liability. The only condition to his right to sue is that there be heirs. Ruiz v. Santa Barbara Gas etc. Co. (1912), 164 Cal. 188, 128 Pac. 330; Barr v. Southern California Edison Co. (1914), 24 Cal. App. 22, 140 Pac. 47.

[11] Fauntleroy v. Lum (1908), 210 U. S. 230, 52 L. Ed. 1039, 28 Sup. Ct. Rep. 641.

[12] Spokane etc. R. R. Co. v. Whitely (May 17, 1915), 35 Sup. Ct. Rep. 655, 658.

Digitized by Google

CONFLICT OF LAWS: DEGREE OF MENTAL CAPACITY REQUIRED TO CHANGE DOMICIL.—In the case of *Cadwalader v. Pye*,[1] the Kansas Supreme Court, following the few cases on the subject, concluded that a comparatively slight degree of understanding is required to change domicil. Practically all legal rules restricting capacity are laid down for the protection of the incompetent from the effects of his own folly or the fraud of others. Indeed, it has been said that there is no true incapacity, not intended as discrimination, that is not designed for such protection.[2] Hence the majority of these rules restrict the power to contract.

In making a contract, the obligor must exercise capacity to assume a burden, running in favor of another, and binding himself alone among all persons under the law. In changing domicil, the actor merely subjects himself to the operation of the legal system of the new jurisdiction—a system that must be presumed to guard rights and privileges and not to divest them, and to operate equally on all within its sphere. Indeed, the very restrictions that the new jurisdiction may place upon an incompetent must be regarded as for his benefit quite as much as those imposed by the law of his old domicil. The few decided cases insist upon a clear distinction between the capacity requisite to assume the consequences of a contract, and that needful to incur the results of a change of domicil.[3] While one of the cases bases its conclusion on a contrary pronouncement,[4] it can scarcely be gainsaid that important consequences attend a change of domicil. But it must be remembered that they are consequences imposed in invitum by the law itself as an incident but not as a direct result of a choice of home. In a word, they are matters of status.[5]

As a result of these principles, we should expect to find (as in fact we do find) that one may acquire a domicil in one state, although he has been placed under a guardian in another state, and has been judicially declared incompetent to contract.[6]

This reasoning seems to go no further than to say that less capacity is required to change domicil than to contract and to leave the question in the caption answered only negatively. But if there is no reason for an artificial and protective incapacity, we

---

[1] (May 8, 1915), 148 Pac. 655.

[2] Holtzendorff's Encyclopedie der Rechtswissenschaft, vol. II pp. 23-25, Extract in Lorenzen's cases on Conflict of Laws, p. 219; State ex rel. Raymond v. Lawrence (1902), 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

[3] Talbot v. Chamberlain (1889), 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; Holyoke v. Haskins (1820), 5 Pick. 20, 16 Am. Dec. 372, (Municipal domicil only; Culver's Appeal (1880), 48 Conn. 165.

[4] Niboyet v. Niboyet (1878), 4 Prob. Div. 11; Gloss v. Sankey (1893), 148 Ill. 356, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196.

[5] Concord v. Rumney (1860), 45 N. H. 423, and all cases in note 3.

[6] Concord v. Rumney (1860), 45 N. H. 423.

Digitized by Google

are remitted to a positive rule of general application, that capacity to change domicil is a question of fact for the jury, and such was the conclusion of the court in Concord v. Rumney.

H. S. J.

CONFLICT OF LAWS: INJURY TO A FOREIGN SEAMAN ON BOARD A VESSEL WHILE IN AN AMERICAN PORT.—In *Faras v. Lower California Development Company*,[1] plaintiff, a citizen of Mexico,[2] was injured while engaged (presumably within the scope of his employment) in exterminating bed bugs upon a vessel owned by defendant, a British corporation, while it lay in the port of San Diego. The court did not decide whether if it was shown that the contract of employment of plaintiff was made at a place outside of the State of California, it would apply any law other than the California law to the definition of the responsibility of a master toward his servant. But it did decide that where it was not shown or alleged where the contract of employment was made that it would not apply the provisions of the British law in regard to the relation of master and servant.

In Schweitzer v. Hamburg-Amerikanische P. A. G.,[3] the contract of employment was made in Germany and the seaman was injured in New York. The New York court held that when, as in the case of master and servant, the relation between the wrongdoer and the injured person had its inception in a contract, the law of the place of making the contract and not the law of the forum should govern. The contract of employment provided for a fixed compensation in case of injury to take the place of a right of action at law.

In Oehler v. Hamburg-Amerikanische P. A. G.,[4] the injury occurred on the high seas, the contract was made in New York, and, therefore, plaintiff claimed that the laws of New York were to be read into the contract. The court, however, applied the tort rule—that the place of the injury governs—and held that the plaintiff could recover compensation only through the German compensation law for seamen.[5] The New York court said that in this case the same result would have been reached if it had applied the contract rule, stating the contract rule to be that "where the contract either expressly or tacitly is to be performed in a given

---

[1] (June 18, 1915), 20 Cal. App. Dec. 1036.

[2] A member of the crew of a vessel is treated by the courts for most purposes as though he were a citizen of the state to which the vessel belongs, The Ester (1911), 190 Fed. 216; Rainey v. N. Y. & P. S. S Co. (1914), 216 Fed. 449; In re Ross (1891), 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. Rep. 897.

[3] (1912), 138 N. Y. Supp. 944, 78 Misc. 448.

[4] (1914), 145 N. Y. Supp. 1090, 84 Misc. 272.

[5] In accord, Beyer v. Hamburg American S. S. Co. (1909), 171 Fed. 582.

Digitized by Google

country there the presumed intention of the parties is that it is to be governed by the law of the place of performance." The court also suggested that the plaintiff's rights were to be determined by the maritime law,[6] and that the maritime law followed the ship wherever it went.

In Thompson Towing and Wrecking Association v. McGregor,[7] a federal court said, "Vessels situated like the Stewart constructively constitute a part of the territory of the nation to which the owners belong." This court held that the Stewart was, through ownership and registration, domiciled in Michigan and that a recovery for a death occurring on board while she was in Canadian waters could be had under a Michigan statute.

In Schuede v. Zenith Steamship Company,[8] another federal court refused to apply the Ohio employers' liability act where the seaman was injured on board his ship while it was in Ohio, the vessel's home port being in Minnesota, saying that the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law.[9]

From these cases, all decided within the last few years, it is apparent that the courts have not all applied the same rule in determining what law should govern the liability in such cases. The basis of the liability would seem to be involved in much uncertainty.

Of the rules which a court might possibly apply the following five appear to be the more important. First, that the action is in tort and the law of the place, i. e. the port, should govern. Second, that the action is in tort and the law of the port should apply, subject to the principle that the law of the ship's country may by comity govern the owner's liability to the seaman. Third, that the action is on contract and that the law of the place of making should govern. Fourth, that the action is on contract and that the

---

[6] In 19 Harvard Law Review 440, the author suggests, "It might be well for the uniformity of the maritime law if the rights of seamen to general damages for physical injuries were made to depend entirely upon contract," and at the conclusion of the article states as the maritime law, "In the case of injury resulting from negligence there is no right to an indemnity, unless the act or acts of negligence constitute a breach of some contractual duty."

[7] (1913), 207 Fed. 209.

[8] (1914), 216 Fed. 566.

[9] In Rainey v. N. Y. & P. S. S. Co. (1914), 216 Fed. 449, deceased died in a port of Peru. He had signed articles in the State of Washington. The court makes no mention of the law of Peru, and says that the statute of the State of Washington giving a right to recover damages for death has no application. And that when deceased "signed the shipping articles and thereupon stepped upon the British ship flying the British flag, as a member of its crew, he stepped upon British territory and became entitled to the protection and benefit of British law in behalf of British seamen, and subject to all its obligations and liabilities."

Digitized by Google

law which the parties intend shall govern, usually the law of the country to which the ship belongs. Fifth, that it is immaterial whether the action is in tort or contract, and that the rights and liabilities of the parties should be fixed by the general maritime law as interpreted by the courts of the forum.

The first rule is objectionable because it is inexpedient from a practical standpoint and has usually been bitterly opposed by foreign shipping interests. The third rule is satisfactory where the seaman is shipped in the home port, and it has the advantage of certainty, but there will inevitably arise cases where its strict application will work hardship. The fifth rule in its application too often degenerates into the application of the first rule under different phraseology. Either the second or the fourth rules would seem most capable of practical application.

Since many of the states have adopted employers' liability laws and some foreign countries have benefit or compensation laws for the seamen in their merchant marine it has become necessary to decide which statute governs. Some of these statutes contain very drastic provisions which can only be justified on the grounds that some of the burden is taken from the employer's shoulders by some form of insurance. Must a shipowner insure under or contribute to the compensation laws of every port which by any chance his vessel may ever enter? It would seem that if there is a compensation statute provided by the law of the country to which the ship belongs, seamen signing articles to serve on board the vessel would be held impliedly to agree to accept the provisions of that statute.[10] But in the case of an employer's liability statute of the port which a foreign ship enters neither employer nor seaman have ever contracted with reference to it.

O. K. P.

DAMAGES: DELAY IN DELIVERY OF TELEGRAM.—Plaintiff, the exclusive sales agent in California of a firm in Ohio filed a bid for the construction of the metal furniture in Agriculture Hall at the University of California. This bid was slightly above that of the only other bidder, to whom the award was given; but had a telegram from his principal announcing a reduction in prices been delivered to plaintiff within a reasonable time, he would have been able to have filed a bid $500 below that which was accepted. Plaintiff averred that in such a case the contract would have been awarded to his firm, for by law the Regents of the University are required to award a contract for construction work to the lowest responsible bidder or to reject "any bid and advertise anew."[1] In

---

[10] As to the nature of employer's liability statutes, see Berton v. Tietzen & Lang Dry Dock Co. (Jan 13, 1915), 219 Fed. 763.

[1] Cal. Pol. Code, § 1438. "The construction and furnishing of the buildings must be let to the lowest responsible bidder . . . . but the regents may reject any bid and advertise anew."

Digitized by Google

McQuilkin v. The Postal Telegraph Cable Company[2] a demurrer to a complaint embodying the above facts was sustained. The court held that the damages for which compensation was asked were too remote and contingent to form the basis of a cause of action, inasmuch as the discretion of a third party to make or not to make the contract intervened.

It is interesting to note the effect of section 1438 of the Political Code upon the "discretion of a third party (the Regents) to make or not to make the contract." It would seem that this section which directs the Regents to award the contract to the lowest bidder or "to reject any bid and advertise anew," would so circumscribe the discretion of the Regents as to make it practically certain what their action would be. According to authority, however, their discretion, if bona fide exercised, still remains. Statutes of a similar nature made applicable to municipal corporations have been held to vest a discretionary and judicial and not a ministerial function.[3] Especially is this so when the words "lowest responsible bidder" are included in the statute.[4] Thus, it is held that no mandamus proceedings will lie in favor of the lowest bidder to compel the awarding of the contract to him.[5] Nor will an injunction issue to prevent the giving of the award to a higher bidder.[6] The code section in question, though couched in mandatory terms, is at most directory in nature and vests a discretionary power.

The ruling of the court, that damages cannot be said to be the direct and necessary result of the delay when the discretion of a third party intervenes, is upheld in many jurisdictions.[7] The application of this rule to given cases at times leaves a plaintiff without remedy even where damage is reduced to a practical certainty. Thus, in the present case, even though the discretion of the Regents intervened, as a practical matter it is highly probable that the award would have been given to the plaintiff's firm. Whether the Regents would have reached this conclusion it is submitted, should have been held to be a matter of fact. It has so been regarded by many courts and recovery has been upheld notwithstanding the fact that any benefit which the plaintiff, the recipient

---

[2] (June 19, 1915), 20 Cal. App. Dec. 1042.

[3] Interstate, etc. Co. v. City of Philadelphia (1894), 164 Pa. St. 477, 30 Atl. 383; United States Wood, etc. Co. v. Sundmaker (1911), 186 Fed. 678.

[4] Johnson v. Sanitary District (1896), 163 Ill. 285, 45 N. E. 104.

[5] State v. McGrath (1886), 91 Mo. 386, 3 S. W. 846; State v. Herman (1906), 63 Ohio St. 440, 59 N. E. 104; 4 Dillon, Municipal Corporations, 264, n.

[6] Interstate, etc. Co. v. City of Philadelphia (1894), 164 Pa. St. 477, 30 Atl. 383.

[7] Beatty Lumber Co. v. Western Union Tel. Co. (1903), 52 W. Va. 410, 44 S. E. 309; Hall v. Western Union Tel. Co. (1910, 59 Fla. 275, 51 So. 819; Western Union Tel. Co. v. Adams Machine Co. (1908), 92 Miss. 849, 47 So. 412.

Digitized by Google

of the telegram, might have received, had the telegram been properly delivered, was dependent upon some act to be performed by a third person.[8] In such cases it is a matter of fact as to whether the third party would have so acted as to benefit the plaintiff; and his testimony is admissible as evidence.[9] It is submitted that this is the proper attitude, that the law should favor the innocent party and not be too lenient with the wrongdoer as the defendant in the principal case admittedly is.

M. W.

EMINENT DOMAIN: LIABILITY FOR VALUE OF FIXTURES PLACED ON LAND BY A TRESPASSER IN SUBSEQUENT CONDEMNATION PROCEEDINGS.—A landowner is entitled to the value of any fixtures placed on his land by a trespasser. The reasons given are that the latter in annexing his chattels to the soil presumably intended to use them as part of the land, and that he cannot reclaim them without committing another trespass. Regardless of his good faith he cannot recover the fixtures or their value, though a bona fide disseisor may set off the value of beneficial improvements if sued by the owner for mesne profits.[1] But when a railroad, or other body endowed with the power of eminent domain, tortiously enters on the land of another, lays tracks, or places other fixtures on the land, an exception to the above rule is allowed to the extent of holding the landowner entitled to recover only the value of the land actually taken, without considering the value added by the improvements if the trespasser resorts to condemnation proceedings to obtain title to the property. This rule is established by a great weight of authority, and is followed in *Atchison, Topeka & Santa Fe Railway Company v. Richter.*[2] New York, and a few other jurisdictions hold that the trespasser loses his property in the fixtures and is bound to pay their value in the condemnation proceedings.[3] California recognizes the prevailing view, at least where the trespass is unaccompanied by force,[4] although one case holds that where entry is forcibly made

---

[8] Western Union Tel. Co. v. Caldwell (1907), 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 749; Kerns v. Western Union Tel. Co. (Mo., 1913), 160 S. W. 556; Cain v. Western Union Tel. Co. (1913), 89 Kans. 797, 133 Pac. 874.

[9] Elam v. Western Union Tel. Co. (1905), 113 Mo. App. 538, 88 S. W. 115; Carter v. Western Union Tel. Co. (1906), 141 N. C. 374, 54 S. E. 274; Western Union Tel. Co. v. Sights (1912), 34 Okla. 461, 126 Pac. 234.

[1] Ewell on Fixtures, 2d ed., p. 79.

[2] (N. Mex., Jan. 12, 1915), 148 Pac. 478. Rehearing denied March 10, 1915. See also Ewell on Fixtures, 2d ed., pp. 88-90; Lewis on Eminent Domain, 3d ed., § 759, and cases there cited.

[3] Village of St. Johnsville v. Smith (1906), 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, 6 Ann. Cas. 379. See also cases cited in Lewis on Eminent Domain, 3d ed., § 759.

[4] Cal. P. R. R. Co. v. Armstrong (1873), 46 Cal. 85.

Digitized by Google

against the objections of the landowner the trespasser becomes bound to pay the value of the improvements in subsequent condemnation proceedings.[5] The distinction has not been followed elsewhere and is expressly disapproved in the principal case. The Supreme Court of California also has indicated its willingness to overrule United States v. Land in Monterey County in so far as it conflicts with the prevailing doctrine.[6] Since the landowner can recover full damages for the trespass, there seems to be no reason for the distinction, as it amounts practically to a forfeiture of the property by way of punitive damages.

The rule of the principal case appears to involve an extension of the doctrine of trade fixtures to cases where there is neither a landlord and tenant relationship nor any agreement between the parties. While it is difficult to find the exact grounds on which to justify the doctrine, it is one which is entirely fair to the parties and is a sensible way of disposing of the matter. The landowner has expended nothing on the fixtures, they are usually useless to him until severed and they were not intended for use in connection with the land. The trespasser desires only an easement over the land, and intended the improvements to be dedicated to use in connection with such easement and as part of an extended plant. He has also the power to obtain the property by taking the proper proceedings. In so far as his failure to do so before entry on the land has injured the landowner, the latter can recover in ejectment, trespass or an action for the use and occupation of the land.[7] As the landowner is entitled only to "just compensation" in condemnation proceedings, why should the public utility be forced to pay twice for the property which it has prematurely affixed to the land?

A closer question is presented when the improvements affixed by the trespasser are, as in the case of a shed or warehouse, capable of use in connection with the land itself, independently of any easement. In such a case it would appear that they were intended for use in connection with the land, rather than with the easement of way, and that they become "fixtures" in the strict sense, and, therefore, that the landowner is entitled to be paid their value in the condemnation proceedings.

J. S. M., Jr.

EVIDENCE: CONFIDENTIAL COMMUNICATIONS: ATTORNEY AND CLIENT.—That an attorney cannot without the consent of his client be examined as to any communications made by the client to him in the course of professional employment is a privilege that has been strongly denounced.[1] In favor of the privilege it

---

[5] United States v. Land in Monterey Co. (1874), 47 Cal. 515.
[6] Albion River R. R. Co. v. Hesser (1890), 84 Cal. 435, 24 Pac. 288.
[7] Justice v. Nesquehoning Valley R. R. Co. (1878), 87 Pa. St. 28.
[1] Appleton on Rules of Evidence, ch. X., following Bentham.

Digitized by Google

has been pointed out that in few cases is the right all on one side. Consequently it would be unfair to permit an opponent to draw out the damaging statements that a client has made to his attorney, since there would be no opportunity to present the statements in the client's own favor. A denial of the privilege would give an advantage to unscrupulous attorneys who would conceal their client's damaging statements and would lead clients to lie to their attorneys by telling only the favorable side of their cases, thus making it impossible to ascertain their legal rights and to arrive at an adjustment without litigation. These practical considerations have resulted in the perpetuation of the privilege[2] and this policy is unquestioned in the case of *Ex parte McDonough*,[3] the dissenting opinion denying the application of the privilege to the facts of the particular case. These facts are briefly, that one Higgins was arrested for alleged frauds against the election laws. Wooley and Gorman were suspected in connection with these frauds. McDonough, an attorney, was retained by Wooley and Gorman to represent them. Some one engaged him to represent Higgins. The attorney declined to inform the grand jury in its investigation of these election frauds, whether Wooley and Gorman had employed him to represent Higgins, or who had so employed him.

Ordinarily the identity of the client is not a privileged matter. No one can employ an attorney to conduct litigation for him and by concealing his own identity thereby escape the consequences for costs, damages, malicious prosecution, etc. Obviously, however, this reasoning does not apply in the case of a defendant in a criminal proceeding. He is, as a matter of right, entitled to counsel. The court would assign him counsel if no one else appeared. It is therefore entirely immaterial who procures or pays the attorney for the defense in a criminal case. The only purpose of the questions, and none other is suggested, must have been to ascertain the identity of the accomplices of the man arrested and obtain an admission against them. Surely, however, one may consult an attorney with reference to an alleged criminal act without surrendering himself to the authorities. It would hardly be contended that a list of suspects could be obtained by the grand jury inquiring of all the attorneys in the community as to who had consulted them in the matter. The situation is not changed by the fact that one of the alleged participants has been arrested. It is urged in the dissenting opinion that to permit an undisclosed accomplice to furnish counsel for those apprehended tends to prevent the state from getting those arrested to turn state's evidence.

---

[2] Wigmore on Evidence, § 2291; Cal. Code Civ. Proc. § 1881; French Code Penal, § 378.

[3] (May 24, 1915), 49 Cal. Dec. 711, 717, 149 Pac. 566.

Digitized by Google

This consideration is offset by the possibility of those apprehended falsely accusing alleged accomplices, a danger against which suspects have a right to guard themselves. The majority opinion would thus seem sound in not denying the privilege on the mere rule of thumb that the identity of the client is not a privileged matter, but in looking into the facts of the case to see whether it comes within the principle upon which the privilege is based.

A. M. K.

EVIDENCE: HEARSAY RULE: USE OF IN PROCEEDINGS BEFORE THE INDUSTRIAL ACCIDENT COMMISSION.—Is the hearsay rule a mere technical rule of evidence? *Englebretson v. Industrial Accident Commission* and *Employers Assurance Corporation Limited v. Industrial Accident Commission*[1] say it is not. This decision seems at first glance perfectly natural, for the hearsay rule has been described as "that most characteristic rule of the Anglo-American law of evidence,—a rule which may be esteemed next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure."[2] Yet the decision of the court is open to question. The hearsay rule had its origin in the jury system. As understood in the English common law it plays no part in continental systems, nor is it of so much importance in England except in jury trials.[3] As Sir Henry Maine remarked, "The English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure."[4] It is one of the curious examples of the formalism of American law that the peculiar English rules of evidence devised for the guidance of the untrained jury should be solemnly applied by courts and other expert tribunals sitting without a jury. The principal cases are, indeed, an example of this formalism, for the decisions rest on the fact that there is no case in point sustaining the ruling of the commission; the search is for a precedent, without a consideration of the theory and history of the rule. The hearsay rule has been referred to by Chamberlayne as standing forth "the Gibraltar of procedure in the midst of more liberalizing tendencies."[5] It is further characterized by the author "as an anomaly in the law of evidence," and the one case where it has been "thought wise to decline attempting to do justice, because the attempt may fail."[6]

---

[1] (Cal., Aug. 7, 1915), 50 Cal. Dec. 241, 50 Cal. Dec. 239.
[2] Wigmore on Evidence, § 1364.
[3] Chamberlayne, The Modern Law of Evidence, § 2720; 3 Cal. Law Rev. 187.
[4] Quoted in Thayer, Preliminary Treatise on Evidence, p. 508.
[5] Chamberlayne, vol. 4, p. vi.
[6] Chamberlayne, §§ 2577, 2719.

Digitized by Google

The facts of the *Employers Assurance Corporation Limited v. The Industrial Accident Commission* are an illustration of Chamberlayne's criticisms. Compensation was sought for the death of the decedent from blood poisoning following a bruise received in the course of his employment. The only evidence of the cause of the injury were statements made by the decedent to a fellow-employee, to his wife, to members of the family, and to several physicians and surgeons. The injury was slight, and in its early stages would apparently give the injured person no claim for compensation. There was nothing in the circumstances to cast suspicion on decedent's account of the cause of injury. It was the kind of statement on the truth of which in practical affairs men base their actions every day of their lives. No one questions the wisdom of the rule that where a witness is available he should give his testimony subject to cross-examination, but where a witness is dead, and where no other evidence can be obtained, justice is denied by excluding hearsay evidence where under the circumstances the court or tribunal is thoroughly satisfied of its truth. In the future on the facts of the particular case a different decision will be possible by reason of the amendment of 1915.[7] The amendment does not, however, cover hearsay on facts other than the cause of death. For example, where the only evidence of the nature of the employment is hearsay, no award can be made on that evidence alone. A broader amendment would not be inadvisable. In 1898 Massachusetts passed a statute which provided "no declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."[8] Civilization has not come to an end since the enactment of that statute in Massachusetts, but much technical obstruction to the ascertainment of truth in judicial proceedings has been removed.

It should be observed that the principal cases do not decide that the Industrial Accident Commission cannot receive hearsay testimony, but merely hold that the writ of review, which is the only way the decision of the commission can be attacked, will result in the annulling of the decision of the commission whenever there is no evidence to support a necessary finding excepting hearsay.

A. M. K.

MARRIAGE: VALIDITY OF MARRIAGE OF MINORS.—The Civil Code of California establishes the age of consent with regard to marriage at eighteen years in the case of males and fifteen

---

[7] 1915 Stat. Cal., ch. 607.
[8] 1898 Stat. Mass., ch. 535.

Digitized by Google

years in the case of females.[1] It further provides that no marriage license shall be issued if the male is below the age of twenty-one or the female is below the age of eighteen unless such minor shall first have obtained the consent of his or her parents.[2] Yet it was stated by way of dictum in the case of *In re Ambrose*[3] that a marriage between two parties, one of whom was a minor, though of the age of consent, was absolutely valid irrespective of the parents' consent. The material facts of that case were these: It was deemed best by the county probation officer that the two parties, the female being then fourteen years of age, be married to avoid the results of promiscuous sexual intercourse. The parents refused their consent, whereupon the officer petitioned to have a guardian appointed for the sole purpose of giving his consent to the marriage of the girl. This was granted, and the guardian appointed. From this decision of the trial court the parents appealed. In the meantime the girl had arrived at the age of fifteen and had been duly married. The decision on this appeal was that the marriage had emancipated the girl from the guardianship of both of her parents and of her appointed guardian, and therefore the cause of action had disappeared.

There is no doubt as to the correctness of this decision. But the following dictum may give rise to some surprise: "As the minor was over the age of fifteen years, she was capable of consenting to and consummating marriage, and, having been duly solemnized, it was valid whether it was consented to by her guardian or parents or not."

However, upon a review of the cases, this dictum seems in accord with the general rule that unless the statute expressly declares a marriage contracted without the necessary consent to be a nullity, it is to be construed as only directory in this respect, so that the marriage will be valid, and not void or voidable, although the disobedience to the statute may entail penalties on the licensing or officiating authorities.[4] It also follows the common law rule.[5] The decision is further supported by the presumption that as certain marriages are expressly made void by the code, all others are valid, and by section 82 of the Civil Code which provides that a marriage may be annulled if the party in whose behalf it is sought to have the marriage annulled, was under the age of legal

---

[1] Cal. Civ. Code, § 56.

[2] Cal. Civ. Code, § 69.

[3] (May 11, 1915), 49 Cal. Dec. 660, 149 Pac. 43.

[4] 26 Cyc. 835; 2 Kent's Commentaries, 78; Damon's Case (1829), 6 Me. 148; Parton v. Hervey (1854), 1 Gray, 119; Fitzpatrick v. Fitzpatrick (1870), 6 Nev. 63; Governor v. Rector (1849), 29 Tenn. 57; Cunningham v. Cunningham (1910), 128 N. Y. Supp. 104.

[5] 1 Bl. Com. 436, 437.

Digitized by Google

consent, and such marriage was contracted without the consent of his or her parents.[6]

Marriage is a contract of the foremost importance, and though the state is concededly a party in interest, it is nevertheless deemed advisable not to disturb or set aside this contract because of a mere failure to observe all the formal requirements of the law. It seems to be well settled that at least the requirement of parental consent is not necessary to a valid marriage, though directed by the state law, unless that law expressly makes the marriage contract void because of the non-conformance.

H. L. K.

MINING LAW: INTEREST OF LOCATOR IN UNPATENTED MINING CLAIM: PASSES TO HEIRS BY DESCENT ON INTESTACY.—Does the interest of the locator of an unpatented mining claim who died intestate pass to his heirs by descent or can they only claim it as the beneficiaries designated by the United States? This was the sole question presented in the case of *Wallace v. Hudson.*[1] An attorney had represented to the plaintiff that she still possessed an interest in her deceased husband's unpatented mining claim and contracted to establish her title to it, which contract she sought to have cancelled. Previously the administrator of the estate had sold her said interest under probate sale in due course of administration. These probate sales conferred no title on the purchasers, it was contended, because an unpatented mining claim is a mere possessory interest in real property which does not pass to one's estate by descent but can only be claimed by the heirs as the donees or beneficiaries designated by the United States. The California Supreme Court held, however, basing its decision upon the authority of a former federal case,[2] that the possessory right of the locator of a mining claim is such an interest in real property as to pass upon his death to his heirs by descent. Such being the case it passed to the administrator for purposes of administration[3] and was subject to valid sale under order of the probate court.

The interest which the locator obtains in an unpatented mining claim differs from that which is acquired in the case of a pre-emption claim,[4] a donation claim[5] or a timber culture[6] entry. In these cases it has been held that the heirs do not take by descent from the deceased entryman. The congressional acts in each of these

---

[6] People v. Souleotes (Jan. 13, 1915), 20 Cal. App. Dec. 79.

[1] (July 22, 1915), 50 Cal. Dec. 125.

[2] O'Connell v. Pinnacle Gold Mines Co. (1905), 140 Fed. 854.

[3] Cal. Code Civ. Proc. § 1581.

[4] Wittenbrock v. Wheadon (1900), 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32.

[5] Hall v. Russell (1879), 101 U. S. 503, 25 L. Ed. 829; Hershberger v. Blewett (1892), 55 Fed. 170.

[6] Cooper v. Wilder (1896), 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163.

Digitized by Google

cases designate the donee or beneficiaries of the entryman in the event of his death. The same thing would be true of a homestead claim, as the statutory provision with regard to the issuance of the patent after the death of the entryman is similar.[7] These claims are mere possessory rights or inchoate property interests which do not ripen into complete property rights until every act imposed by Congress for the acquisition of a patent thereto has been complied with. On the other hand the interest of the locator of a mining claim by the terms of the federal statutes[8] is looked upon as in the nature of a vested property right. And the courts have always treated such interests as an interest in the nature of a fee, looking upon the claimants thereof as owners as against all other persons but the United States.[9] Thus they have been held subject to taxes in the same manner as other real estate;[10] specific performance of an agreement to convey such an interest upon the acquisition of a patent thereto has been allowed so that it can be said to be freely transferable;[11] and execution sales thereof have been held to be valid.[12]

V. M. A.

NUISANCE: RIGHT OF RAILROAD TO MAINTAIN COAL DOCKS.—In *Smith* v. *Northern Pacific Railway Company*[1] the Supreme Court of Montana was confronted with the question whether a railroad company obtaining its right of way from the United States could be held liable by a subsequent grantee of the government for injury to his adjoining property from coal dust, noise, and smoke due to the operation without negligence of coal docks used to supply the company's engines. In deciding that the docks caused no legal nuisance to the plaintiff, the court failed to cite any case in which the cause of injury was coal docks or chutes or bins. The cases relied on were cases of the construction of additional tracks,[2] switches,[3] turntables,[4] and

---

[7] U. S. Rev. Stat. §§ 2291, 2292.

[8] U. S. Rev. Stat. §§ 2322, 2324.

[9] Merritt v. Judd (1859), 14 Cal. 59; Hughes v. Devlin (1863), 23 Cal. 501.

[10] Forbes v. Gracey (1876), 94 U. S. 762, 24 L. Ed. 313.

[11] St. Louis Min. & Mil. Co. v. Montana M. Co. (1898), 171 U. S. 650, 43 L. Ed. 320, 19 Sup. Ct. Rep. 61.

[12] McKeon v. Bisbee (1858), 9 Cal. 137, 70 Am. Dec. 642; Phoenix Min. & Mil. Co. v. Scott (1898), 20 Wash. 48, 54 Pac. 777.

[1] (April 21, 1915), 148 Pac. 393.

[2] C. R. I. & P. Ry. v. Smith (1884), 111 Ill. 363; White v. Chicago, etc. R. R. Co. (1890), 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Hileman v. Chicago Ry. Co. (1901), 113 Iowa, 591, 85 N. W. 800; Louisville & N. R. R. Co. v. Scomp (1907), 124 Ky. 330, 98 S. W. 1024.

[3] Ill. Centr. Ry. Co. v. Anderson (1898), 73 Ill. App. 621.

[4] See note 3, supra.

Digitized by Google

elevation of roadbeds.[5] In several of the cases referred to by the Montana court, as in the principal case, both parties to the action derived title from the same grantor, the point upon which the court chiefly relies in making its decision.

The authorities are unanimous in declaring that if the right to cause the damage in question was not paid for at the time of the grant or the exercise of eminent domain, the right to compensation accrues at the time that the damage is caused.[6] And they are practically agreed that if such damage was not presumably within the reasonable contemplation of the parties in the first instance, it was not paid for then.[7] Hence, if the given facility and the damage consequent on its use could not reasonably be presumed to have been contemplated at the time of the grant, it makes no difference that the adjacent owner was the grantor of the right of way or his successor. If the damage has not been paid for, the grantor has as much right to compensation as a stranger. The difference of opinion is over what facilities inflict injuries beyond those which a railroad has a right to inflict without compensation by virtue of the paramount public benefit from its operation. This is a question of construction in the particular case. It is, of course, more reasonable to conclude that such facilities as coal docks were contemplated by the parties where the grant was across a long stretch of the public lands than where there was a grant of only a short strip across a farm or a city lot.

A majority of courts hold that facilities which cause serious interference with the enjoyment of adjoining property and which are of such a nature that they might reasonably be located elsewhere than on the site actually selected, even though with less convenience to the railroad company, stand on a different basis from the operation of trains and the comparatively slight inconvenience that must be expected at any place along the right of way or at stations.[8] In such cases the railroad is deemed to be acting in its private capacity, unsupported by public interest, and must pay for all damage thus inflicted.[9] When this fact has been established as to the facility in question, the necessity of such equipment in operating the road is no defense.[10] For

[5] Kotz v. Ill. Centr. Ry. Co. (1900), 188 Ill. 578, 59 N. E. 240; Gillespie v. B. R. & P. R. R. Co. (1909), 226 Pa. 31, 74 Atl. 738; Cassidy v. Old Colony R. R. Co. (1886), 141 Mass. 174, 5 N. E. 142.

[6] Texas & Pac. Ry. Co. v. Edrington (1907), 100 Tex. 496, 101 S. W. 441.

[7] Willson v. N. Y. Centr. etc. R. R. Co. (1913), 146 N. Y. Supp. 208.

[8] Baltimore & Potomac R. R. Co. v. Fifth Baptist Church (1883), 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719; Matthias v. Minneapolis, etc. Ry. Co. (Minn., 1914), 146 N. W. 353.

[9] Southern Ry. Co. v. McMenamin (1912), 113 Va. 121, 73 S. E. 980.

[10] Louisville & N. R. R. Co. v. Walton (Ky. App., 1902), 67 S. W. 988.

Digitized by Google

these reasons courts have frequently allowed recovery in the case of roundhouses,[11] switchyards,[12] repair shops,[13] water tanks and turntables,[14] throwing of surface water on adjoining property where not contemplated by the parties at the time of grant,[15] stock pens,[16] and lastly from coal chutes or bins.[17] In some of the cases cited the adjoining owner was the grantor of the right of way or his successor, and in some cases not. But the courts do not rest their decisions on this point where the facilities are of the character under discussion.

It would seem unreasonable to hold that the railroad had, against every subsequent grantee of the government along the entire right of way, a sort of perpetual, floating easement—the right to maintain every kind of necessary facility—to be brought into operation at any time, against any piece of adjoining land, according to its own convenience or whim. We might imagine the case of the owner of a great tract of land selling a portion of it for a specific purpose—a smelter or a slaughter-house, for instance—and later subdividing and selling the remainder for town lots. If the reasoning of the principal case be followed, every subsequent purchaser thereof, with or without notice, would have to endure forever all injuries that might be inflicted by the lawful use of the smelter or slaughter-house. It is submitted that courts should not whittle away the beneficial rules of the common law in respect to nuisance by the recognition of the creation of rights analogous to easements, but unknown to the classification of the law of property.

H. E. A.

PARENT AND CHILD: IS STATUS OF CHILD DETERMINED BY DECREE OF ABANDONMENT.—In *In re Michels*[1] the consideration of a decree of abandonment as determining the judicial status of the child is unique. The facts of the case were that the parents

---

[11] Louisville & N. T. R. R. Co. v. Lellyett (1905), 114 Tenn. 368, 85 S. W. 881.

[12] Matthias v. Minneapolis, etc. Ry. Co. (Minn., 1914), 146 N. W. 353.

[13] Baltimore & Potomac R. R. Co. v. Fifth Baptist Church (1883), 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719.

[14] Missouri, K. & T. Ry. Co. v. Perry (Tex. Civ. App., 1907), 102 S. W. 1169.

[15] Childers v. Louisville & N. R. R. Co. (Ky. App., 1903), 74 S. W. 241.

[16] Missouri, etc. Ry. v. Mott (1904), 98 Tex. 91, 81 S. W. 285.

[17] Louisville & N. T. R. R. Co. v. Lellyett (1905), 114 Tenn. 368, 85 S. W. 881; Southern Ry. Co. v. McMenamin (1912), 113 Va. 121, 73 S. E. 980; Spring v. Delaware, L. & W. R. R. Co. (1895), 34 N. Y. Supp. 810, 88 Hun 385 (affirmed in 151 N. Y. 692, 51 N. E. 1094); Louisville & N. R. R. Co. v. Walton (Ky. App., 1902), 67 S. W. 998; Cogswell v. N. Y., etc. R. R. Co. (1886), 103 N. Y. 10, 8 N. E. 537.

[1] In re Michels (June 4, 1915), 49 Cal. Dec. 793.

Digitized by Google

had left their sick infant temporarily in the care of a charitable hospital, and then in the care of a nurse, who had taken a fancy to it. In proceedings in a petition for adoption brought by the nurse, the Juvenile Court refused to grant the petition for adoption, but declared the child "an abandoned child," without committing the custody of the child to any person or institution. The parents later petitioned the Juvenile Court to be appointed guardian of their own child. They were refused and appealed from the decision. The Supreme Court solemnly considered the question of the parents' right to the custody of their child. A parent always has the right of custody of his child unless the child has been committed to the care of another because the parent is unfit, unable, or unwilling to perform the parental duties.[2] As the infant, Rosa Michels, had not been committed to the care of any one else, either her parents were still her legal protectors, or she was left suspended between parents and court like Mahomet's coffin between heaven and earth. A parent may voluntarily put his child in the custody of another, but such custody is revocable at the pleasure of the parent, for he has not parted with the right of custody.[3]

Even if the court had committed Rosa to the custody of another, it is not evident that that would have changed her status. Because the custody of the parents had been interfered with for the child's welfare, it would not destroy the relationship of parent and child. The parent would still be liable to support the child.[4] Upon the parent showing himself able and competent to assume the custody of the child it would be returned to him.[5] It is only where a child is legally adopted that its status is interfered with. By adoption the rights and duties of the natural parents are shifted to the foster parents.[6] Since there was no adoption in this case, the status of the child remained the same, and the parents were not entitled to any judicial reiteration of the normal status of the child.[7] The remedy of a parent who desires custody of a child retained under order of the Juvenile Court would seem to be to apply to have the order set aside.

E. B. B.

PUBLIC SERVICE COMPANIES: VALUATION FOR RATE-MAKING PURPOSES: GOING CONCERN: PAVEMENT OVER MAINS.—Two questions with reference to valuation have, for some time past, been frequent storm centers in public utility rate hearings before com-

---

[2] Ex parte Becknell (1897), 119 Cal. 496, 51 Pac. 692.
[3] Matter of Galleher (1905), 2 Cal. App. 364, 84. Pac. 352.
[4] Matter of Ross (1907), 6 Cal. App. 597, 92 Pac. 671.
[5] In re Knowack (1899), 158 N. Y. 482, 53 N. E. 676; McFall v. Simmons (1900), 12 S. D. 562, 81 N. W. 898.
[6] Viereck v. Sullivan (1914), 77 Wash. 313, 137 Pac. 456.
[7] Aldrich v. Superior Court (1898), 120 Cal. 140, 52 Pac. 148; Aldrich v. Barton (1908), 153 Cal. 488, 95 Pac. 900.

Digitized by Google

missions and courts. One is with regard to the value of the utility's plant as a "going concern." The other arises in connection with the valuation of gas or water mains lying beneath streets which have been paved after the mains have been laid. For the reason that these two problems are considered by the Supreme Court of the United States in its opinion in the case, *Des Moines Gas Company v. City of Des Moines*[1] promises to be a much cited decision in further rate controversies throughout the country.

The term "going concern" is of somewhat vague and indefinite connotation. Probably none of the various theories as to its place and scope in connection with valuation is entirely satisfactory.[2] There can be little ground for disagreement, however, with Mr. Justice Lurton's well-phrased statement that "the difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."[3] The "going value" of a utility has been recently defined by the Supreme Court of Wisconsin as "that part of its value due to its having an existing, established business."[4] Whether a separate sum to cover "going value" might properly be included in the total valuation the decision of the present case leaves somewhat in doubt. The opinion approves, however, the treatment of the problem by the master in the lower court, where a separate allowance for "going concern" was refused with the statement that the physical value had been reckoned upon the fact that the plant was in successful operation, otherwise its value would be much less. This would seem to be a valuation of "going concern" only in the sense that merely the scrap or salvage values of the various elements of the plant were not taken. Of such a valuation the New York Court of Appeals has said: "To say that that sufficiently allows for 'going value' is the same as to say that 'going value' is not to be taken into account."[5] Nevertheless the theory that "going value" is not an item to be separately considered has met with considerable approval.[6] Because of the difficulty of fixing a separate sum to

---

[1] (June 14, 1915), 35 Sup. Ct. Rep. 811.

[2] See Whitten, Valuation Of Public Service Corporations, chaps. XXI to XXV, 1914 Supp. chaps. XXI to XXIV.

[3] Omaha v. Omaha Water Co. (1910), 218 U. S. 180, 30 Sup. Ct. Rep. 615, 54 L. Ed. 991 (a purchase case).

[4] Oshkosh Waterworks Co. v. Railroad Commission of Wisconsin (Wis., June 1, 1915), 152 N. W. 859, P. U. Rep. 1915-D 336 (a purchase case).

[5] People v. Willcox (1914), 210 N. Y. 479, 104 N. E. 911; see also Public Service Gas Company v. Board of Public Utility Com'rs. (1913), 85 N. J. Law 476, 87 Atl. 651; Pioneer Telephone and Telegraph Co. v. Westenhaver (1911), 29 Okla. 429, 118 Pac. 354; Bonbright v. Geary (1913), 210 Fed. 44.

[6] Cedar Rapids Gaslight Co. v. Cedar Rapids (1909), 144 Iowa, 426, 120 N. W. 966, affirmed in 223 U. S. 655, 32 Sup. Ct. Rep. 389,

Digitized by Google

cover it, there is frequently a failure to give this element what would seem to be its due consideration. The "real value" of the "difference between a dead plant and a live one," however, ought not to be disregarded. The process of building up a business and creating an income is almost invariably an expensive one, and it is well recognized that the average utility must pass through an initial period during which its income will constitute a very inadequate return on its investment. It should be noted that the opinion in the Des Moines case does not disclose the showing made in the record with reference to these matters, nor does it hold that a separate allowance to cover "going value" would, in all cases, be necessarily improper.

In determining the value of mains lying beneath the surface of the streets, should the cost of cutting through the pavement and relaying it be taken into account although the mains were, in fact, laid before any paving had been done? If present value, rather than original cost, be the basis on which the valuation is to be made,[7] and if the cost of reproduction, less depreciation, be the method by which the present value of physical structures is to be determined,[8] there seems to be no logical escape from a valuation which allows for the cost of cutting through and relaying all existing pavements.[9] On the other hand, there is a natural reluctance to allow a utility an increased valuation on the basis of an expense which was never incurred, and it seems altogether undesirable that the commendable industry of a city in improving its streets should automatically confer upon public service companies the constitutional right to exact additional charges on the theory of increased valuation. It was evidently the latter view-point that appealed to the Supreme Court in the Des Moines case, where, with a very brief consideration of the question, Mr. Justice Day reached a decision adverse to the contention of the company. The result accords with a number of decisions by other courts on the same point,[10] and there can reasonably be little ground for objec-

---

56 L. Ed. 594; Spring Valley Waterworks v. San Francisco (1911), 192 Fed. 137; Cumberland Telephone and Telegraph Co. v. City of Louisville (1911), 187 Fed. 637; Montana, W. & S. R. Co. v. Morley (1912), 198 Fed. 991.

[7] San Diego Land & Town Co. v. Jasper (1903), 189 U. S. 439, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; Willcox v. Consolidated Gas Co. (1909), 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382; Minnesota Rate Cases (1913), 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511.

[8] Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371; Minnesota Rate Cases (1913), 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511.

[9] See, Hayes, Public Utilities, Their Cost New and Depreciation, p. 33; Floy, Valuation Of Public Utilities, p. 86.

[10] Cedar Rapids Gaslight Co. v. Cedar Rapids (1909), 144 Iowa, 426, 120 N. W. 966; People v. Wilcox (1914), 210 N. Y. 479, 104 N. E. 911; Oshkosh Waterworks Co. v. Railroad Commission of Wisconsin (Wis., June 1, 1915), 152 N. W. 859, P. U. Rep. 1915-D,

Digitized by Google

tion in so far as the question involved is regarded in and of itself. But in its larger aspect does the decision mean that, after all, original cost is to be the basis of valuation,—a theory which the Supreme Court has definitely disapproved?[11] Or is it to be regarded as a holding that the cost-of-reproduction method is not permissible in certain instances where its use will produce a not to be desired result?[12] If logic is to yield to considerations of natural equity in applying the cost-of-reproduction test, at least one instance suggests itself in which an increased, rather than a lessened, valuation should be allowed the utility. This would be the case with regard to "piecemeal construction." The fact that a utility was constructed piecemeal, as almost every utility has been, undoubtedly added to its actual cost. Yet this could not logically be considered in determining its reproduction value.[13]

In the light of this recent decision and of Mr. Justice Hughes' previous statement in the Minnesota Rate Cases,[14] that valuation is not a matter of formulas, it would seem that the answer to many of the questions connected with the valuation of public utilities which have not yet been considered by the Supreme Court of the United States must remain a matter of considerable uncertainty until they have been specifically passed upon by that body.

W. W. F., Jr.

TORTS: LIBEL: QUALIFIED PRIVILEGE.—Persons who act in accordance with the posted requests of employers to report the incivility or misconduct of an employee, are usually considered as performing a meritorious though disagreeable public service. In *Adams v. Cameron*,[1] however, such a person was subjected to a suit for libel and forced to pay five thousand dollars damages. The defendant in this case was a passenger upon a train of which plaintiff was the conductor. It appeared from the evidence that defendant in his communication to the railroad company stated

---

336. Contra, Consolidated Gas. Co. v. New York (1907), 157 Fed. 849, 855; People v. Willcox (1913), 141 N. Y. Supp. 677 (an opposite decision on the point in question was reached by the Court of Appeals in its opinion in the same case, cited supra).

[11] See cases cited in note 7, supra.

[12] In People v. Willcox (1914), 210 N. Y. 479, 104 N. E. 911, the New York Court of Appeals said: "The cost of reproduction, less accrued depreciation, rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience, and must be applied with reason."

[13] "The fact that appellant's plant has been constructed piecemeal does not increase its present value, although the cost of construction by such method may have been greater than if it had been constructed at one time." Pioneer Telephone and Telegraph Co. v. Westenhaver (1911), 29 Okla. 429, 118 Pac. 354, 357.

[14] (1913), 230 U. S. 352, 434, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511, 1556.

[1] (June 11, 1915), 20 Cal. App. Dec. 971.

Digitized by Google

that plaintiff had acted discourteously while under the influence of liquor. The plaintiff explained the appearances against him by showing that he had had a severe cold which caused him to take whiskey and glycerine for its treatment. As a result of defendant's communication plaintiff was discharged. The jury found that the defendant had acted with malice. The verdict may therefore be justified.[2]

But the trial court, in giving its instructions, which were approved by the District Court of Appeal, insisted upon "injecting into each a qualification to the effect that before libelous matter can be privileged it must appear that it was and is substantially true."[3] Upon application by defendant for a hearing before the Supreme Court, that body, while denying the application upon the finding of malice, took the opportunity to say that it did not approve of what the District Court of Appeal said in regard to the instructions.[4] The latter court overlooked the fact that in civil actions for libel or slander truth and privilege are two distinct defenses; that truth is always a defense regardless of privilege;[5] and that privilege is always a defense regardless of truth.[6] The District Court of Appeal cited no case to support its opinion excepting some involving defamation of a candidate for public office.[7] But in this class of cases the great weight of authority extends the privilege only to criticism and comment, not to misstatements of fact.[8] In the principal case, however, the privilege claimed is based upon section 47, subdivision 3, of the California Civil Code, which renders privileged "a communication, without malice, to a person interested therein, by one . . . . who is requested by the person interested to give the information." Even though such statements are untrue they are qualifiedly privileged.[9]

The only question remaining is whether one publishing a libel in response to a public notice will be accorded the same protection

---

[2] Cal. Civ. Code, § 47, subd. 3; Preston v. Frey (1891), 91 Cal. 107, 27 Pac. 533; Shomberg v. Walker (1901), 132 Cal. 224, 64 Pac. 290; Hollenbeck v. Ristine (1898), 105 Iowa, 488, 75 N. W. 355, 67 Am. St. Rep. 306, and note.

[3] Adams v. Cameron, supra, p. 981.

[4] The San Francisco Recorder, August 17, 1915.

[5] Wilson v. Fitch (1871), 41 Cal. 363; Press Co. v. Stewart (1888), 119 Pa. 584, 14 Atl. 51.

[6] Cal. Civ. Code § 47, subd. 3; Holt v. Parsons (1858), 23 Tex. 9, 76 Am. Dec. 49, 51, and note; McAllister v. Detroit Free Press Co. (1889), 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, and note.

[7] Jarman v. Rea (1902), 137 Cal. 339, 70 Pac. 216; Dauphiny v. Buhne (1908), 153 Cal. 757, 96 Pac. 880; Tanner v. Embree (1908), 9 Cal. App. 481, 99 Pac. 547.

[8] Cases cited in note 7, and Belknap v. Ball (1890), 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622; Upton v. Hume (1893), 24 Ore. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 683.

[9] Ritchie v. Arnold (1898), 79 Ill. App. 406; Hebner v. Great Northern R. Co. (1899), 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387, and note.

Digitized by Google

as one acting upon a personal request. In general all instances of privilege have as a basis the making of a statement in the discharge of some public or private duty or interest, whether legal or moral.[10] Development in this branch of the law has been marked by a widening of the interest or duty necessary to make a privileged occasion. The modern tendency is to apply the rule liberally, having regard for the general welfare of society,[11] so that it is privileged not only to give a character to a former servant, at the request of a prospective employer,[12] but even, as has been held, to volunteer information to a person interested where it is right in the interests of that person or of society that he should be informed.[13]

In view of this development it would seem but natural to extend the rule of privilege to the new situation where the request for information appears in the form of notices to the public at large. If information given at the request of the recipient is privileged, and voluntary communications intended to benefit society are also being held privileged, it seems but just that the giving of information to one interested, at his public request, and for the benefit of himself and society should also be privileged.

J. G.

---

[10] Toogood v. Spyring (1834), 1 Cr. M. & R. 181; 18 Laws of England, 686.

[11] Stuart v. Bell [1891] 2 Q. B. 341; Andrews v. Nott Bower [1895] 1 Q. B. 888.

[12] Child v. Affleck (1829), 9 B. & C. 403, and cases cited in note 9.

[13] Coxhead v. Richards (1846), 2 C. B. 569; Davies v. Snead (1870), 5 Q. B. 608; Mott v. Dawson (1877), 46 Iowa, 533 ("Every one who believes himself possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right, in good faith, to communicate such his belief to that other." p. 536.)

Digitized by Google

Book Reviews

A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John H. Wigmore. Second edition. Little, Brown & Co., 34 Beacon St., Boston. 1915. pp. xlv, 935. $6.50 net.

The experience of the profession in the practical use for ten years of Wigmore on Evidence shows the inherent soundness of the work. Little has been rewritten or modified. Where additional text has been inserted it usually indicates a new development in the law. Of particular note in this connection is the warning against executive usurpation by making the certificate of administrative officers conclusive for certain purposes, as in the immigration statutes (page 296). It is by such insidious methods employed by various executive and administrative departments, bureaus and commissions of the government, both federal and state, that the rights of citizens can be taken away without a fair hearing. Another excellent suggestion is made under the Confession Rule (page 182). The public are disgusted with the acquittal of self-confessed criminals on some technicality that has no real effect on the truth of the confession. At the same time the third degree outrages of the police are equally intolerable. The proposal of the author is to require the accused person to be taken before an authorized magistrate within a day after arrest for private examination, being warned that he may keep silent, but his statement to be taken down if he is willing to make one.

The greater part of the volume is made up of citations classified by states, usually with a brief indication of the point decided arranged under the proper section and note number of the main treatise. This may seem dry, but it is not, for every page sparkles with anecdote or the picturesque comment of the author on some misguided ruling, as on page 308, where the author notes the amusing see-saw performance of the Texas courts on the admission in criminal cases of the former testimony of a deceased witness. In Maryland the court excluded the question "Please state whether or not, in your opinion, that horse was fit for a lady to drive." To which the author remarks, "Thus is Common Sense shut out of court and Scholasticism enshrined on an altar" (page 451). A New York judge doubted as to whether in a murder case evidence could be admitted that keys with a tag bearing defendant's name were found at the place of crime. Comment as follows: "This case shows how different a man the judge is when reasoning about his own affairs at home and reasoning in the judicial straitjacket; suppose he had forbidden a certain young man to court his daughter and then one morning found on the parlor floor by the sofa a bunch of keys with the tabooed young man's name; would he hold that 'there was some doubt whether the evidence was properly admitted'?" (page 45).

Digitized by Google

One glancing over this volume, however, must feel that a system of evidence which produces in ten years so many rulings of so little intrinsic value, and which produces so many that affront common sense must be in itself defective. We therefore turn to the preface where the author lays bare the causes of the disease and indicates the cure. It is refreshing in these days of the muckraker to have an expert, such as Professor Wigmore, say, "Amidst the ululations of the demagogues, and the suspicions of the laity, it is a duty to express a sense of satisfaction at the lack of reasonable grounds for complaint on the score of corrupt intent and political bias." (Preface, page x).

An abstract cannot do justice to the constructive proposals of the author in this preface. Every lawyer should read it for himself. As is pointed out, however, so much of the trouble rests in the imperfections of human nature and society that while some specific legislation is desirable, general improvement can come only with the gradual improvement of social conditions. "Sound rules of evidence, in short, are as much a symptom as a cause of better justice."

A. M. K.

GOOD WILL, TRADE MARKS AND UNFAIR TRADING. By E. D. Rogers. A. W. Shaw Co., Wabash Ave. and Madison St., Chicago, Ill. 1914. pp. 288. $2.50 net.

Although written by a lawyer of wide experience in this branch of the law the publishers say that it is not a law book. It is, however, more entertaining and probably more useful than most of the conventional legal treatises. The author has given an interesting history of trade marks and unfair competition in different countries since the dawn of civilization, and has then taken up the practical questions of building good will for business, helping the public identify the product and defending the business from unfair competition. There is a wealth of suggestion and apt illustration in the treatment of the subject, much of it from the author's own experience and impossible to find elsewhere in books. The reader is not likely to forget in practice the wisdom of advising his clients to preserve complete records of their trade marks and labels, the time, place and character of use, together with exhibits. Nor is one likely to forget the author's warning that unfair competition cases, as distinguished from those of technical trade mark, usually turn on questions of fact that cannot be properly determined by a mere comparison of labels. For the successful prosecution of such cases the lawyer must do or have done the detective work of ascertaining whether people have been deceived. A few cases of actual deception are worth hours of expert testimony and argument. The advisability of relentless pursuit of willful infringers without notice is forcibly presented and illustrated.

Digitized by Google

As the modern lawyer has come to be more and more the business adviser of his clients should not law books be written from the business man's point of view? Is the lawyer doing his duty who simply tells his client whether the proposed trademark is registrable or should he not give his client the benefit of his experience and point out the business, advertising and psychological considerations that make one trade mark valuable and another of equal legal validity undesirable. A book of this kind, accumulating the author's practical experience is a mine of information to the lawyer. If the author had added citations to the reports where the matter has been passed upon by the courts, the book in addition to its other merits would possess most of the utility of the ordinary legal treatise.

A. M. K.

LANDMARKS OF A LAWYER'S LIFETIME. By Theron G. Strong. Dodd, Mead and Co., 4th Ave. and 30th St., N. Y. 1914. pp. 552. $2.50 net.

From his experience of forty years' practice at the New York bar, Mr. Theron G. Strong has compiled an attractive collection of legal reminiscences. Books of this character usually appeal only to a limited circle. Mr. Strong's book, despite the local nature of the subject-matter, is an exception to this rule.

The greater part of the work consists of sketches of various prominent New York lawyers and judges. The careers of Judges Church, Allen, Grover, Folger and Rapallo, of the New York Court of Appeals, are described in detail, the narrative ranging from a purely anecdotal to a seriously historical character. In connection with his treatment of Judge Noah Davis, the author gives us the full text of the protest presented by defendant's counsel against his trial of the famous case against William M. Tweed, this document having been signed by eight prominent lawyers, including David Dudley Field, Willard Bartlett and Elihu Root. The remarks of Judge Davis, imposing punishment for the presentation of the paper, as a contempt of court, are also given in full.

William M. Evarts, Charles O'Connor and John K. Porter are among the distinguished lawyers of whom an account is given. We have glimpses of Justices Bradley and Field, of the United States Supreme Court, and the author devotes a chapter to William F. Howe, of "Howe and Hummel" fame.

The book, however, does not consist entirely of personalia. There is a valuable account of the development and influence of the Bar Association of New York, and also a discussion of the changes in practice brought about by the multiplication of books, the adoption of modern improvements, and the invasion of the lawyer's field by title insurance and casualty companies.

M. E. H.

Digitized by Google

POLARIZED LAW. THREE LECTURES ON CONFLICT OF LAWS, DELIVERED AT THE UNIVERSITY OF LONDON. By T. Baty. Stevens and Haynes, 13 Bell Yard, Temple Bar, London, W. C. England. 1914. pp. xv, 210. $1.80.

If Dr. Baty had selected a less expressive title for his little book on Conflict of Laws, if he had properly padded it with excerpts from digests and quotations from cases, so as to make it voluminous and expensive, if he had, in short, written one of that sort of books that Charles Lamb called "*biblia a-biblia*, books that are not books," which nobody could, would or should read, doubtless more buyers would have been attracted. As it is, he has written a work which he who reads will read again, and will not only read but will consult when problems arise, connected with this difficult subject.

Dr. Baty boldly says that he proposes to write an interesting book, and he certainly succeeds in the task that he sets himself. It would have been something of an achievement to have done merely this, but the author has done much more. In his discussion of difficult problems, lying upon the border land of his subject, he has unrolled the map of the entire field. Particularly valuable to the reader who knows nothing of the European theories on this subject—and what American reader does?—is that part of the book which deals with this matter and which contains the first complete translation from the French text of the Hague Private Law Conventions. American lawyers who believe that the New York view upon the subject of divorces granted by constructive service, expounded and approved by the majority of the United States Supreme Court in Haddock v. Haddock, marks the high water point of injustice and absurdity, would do well to look into the Russian or Italian theories upon this subject. Quite recently the Supreme Court of Palermo has held that a divorce granted by a competent court in the State of New York upon actual service, both husband and wife being domiciled in that state, would not be recognized in Italy. Only Italian courts can affect the status of Italian subjects. The fact that the husband was a naturalized American citizen, and the wife, by American law, was also an American citizen, made no difference. A more striking "conflict" between the principle of "domicile" and that of "nationality" could hardly exist. To Italians about to divorce, the conscientious lawyer's advice should be that which Punch gave to Englishmen about to marry, "Don't." To the aforesaid conscientious lawyer, the reviewer's advice is, "Read Dr. Baty's book." It will at least point out to him some of the many pitfalls that lurk for the unwary in continental theories about the basic principles of Conflict of Laws.

O. K. M.

Digitized by Google

THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY. By Gerrard Glenn. Little, Brown & Co., 34 Beacon St., Boston. 1915. pp. xlvi, 461. $3.00 net.

As its title indicates, this work presents a general discussion of the principles of law pertaining to the rights which creditors have in the property of their debtors, and the remedies by which these rights are conserved and enforced. No attempt is made to consider in minute detail any particular phase of the subject, the primary object of the treatise being, in the author's own words, to harmonize, as far as possible, the various statutes and doctrines which are scattered through the body of our law so as to demonstrate the system afforded by our jurisprudence for the realization of debts out of the debtor's property. In the fulfillment of this object Mr. Glenn has given us a book which occupies a position quite unique in the field of law with which it deals. Works upon the law of insolvency and bankruptcy and related subjects we have, of course, in considerable number, but in none of those known to the writer of these lines is to be found an adequate treatment of the subject here discussed. It has remained for Mr. Glenn to fill the hitherto existing need, and in the performance of his task he has achieved a success not usually gained by the pioneer.

As a basis of preliminary study for those who propose to thoroughly equip themselves for practical work in the field of business or commercial law, or in the administration of our laws of insolvency or bankruptcy, as well as for those who pursue the subject for purely academic purposes, the work will be found of great value. The subject matter is presented in a clear and logical manner, with proper attention to the historical development, and an avoidance of a fault frequently to be observed in modern textbooks, namely, the tendency to state concrete rules of law without due regard for the underlying theories upon which they are erected. No exhaustive review of judicial decisions has been made, but a large number of carefully selected cases are cited, with such quotations as are best adapted to the author's plan of exposition.

It is not to be assumed, from what has been said, that Mr. Glenn's book is free from errors and defects, either in form, or in substance. In both respects, and particularly in the latter, in the matter of statements unduly inclusive, and in a very few cases, of inaccurate statements apparently made through inadvertence, some criticism may be fairly advanced. These faults are, however, of infrequent occurrence, and in marking them due allowance should be made for the fact that there was no earlier work covering his chosen field to which the author might look for suggestions, and for the further fact that the sacrifice of strict accuracy is the price which must almost invariably be paid for brevity and compactness of treatment.

J. U. C., Jr.

Digitized by Google

BANKING LAW OF NEW YORK. By Amasa J. Parker, Jr. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. vi, 547. $3.50.

This book contains the full text of the banking laws of the State of New York, (Chapter 2 of Consolidated Laws; Chapter 369, Laws of 1914), together with appropriate notes, annotations, and cross references. A comprehensive index and a convenient arrangement of the subject matter of the work make it a useful reference book in the hands of either the practical banker or the bank lawyer of the jurisdiction concerned.

J. U. C., Jr.

INSURANCE LAW OF NEW YORK. Amasa J. Parker, Jr. Banks Law Publishing Co., 23 Park Place, New York. 1914. pp. 443 and text of Chapter 28, General Corporation Law of 1909. $3.00.

A compilation of the insurance laws of the State of New York, including all amendments of 1914, together with certain laws of general scope which have particular application to the subject of insurance and insurance corporations. In addition to the text of the statutes, the work contains many valuable notes having reference to their source, history and judicial construction. These notes are supplemented with citations to leading cases upon a great number of the points treated, a feature which renders the work of special interest to the lawyer.

J. U. C., Jr.

THE DOCTRINE OF INTERVENTION. By Henry G. Hodges. The Banner Press, Princeton, N. J. 1915. pp. xii, 288. $1.50 net.

The treatment of the Doctrine of Intervention in the present volume lacks a clear cut distinction between the legal and the political aspects of intervention. Much historical material has been brought under discussion, but the reader is left in some doubt as to the fundamental principles upon which intervention is legally justifiable.

Chapters on Intervention in Mexico and Interventions in the European war give an atmosphere of timeliness to the volume.

E. E.

Digitized by Google

BOOKS RECEIVED

ELEMENTARY LAW. By Marshall D. Ewell. Matthew Bender & Co., 511-513 Broadway, Albany, N. Y. 1915. Vol. II, pp. xvi, 1037, $4.50.

THE VALIDITY OF RATE REGULATIONS STATE AND FEDERAL. By Robert P. Reeder. T. & J. W. Johnson Co., 535 Chestnut St., Philadelphia. 1914. pp. xv, 440. $5.00 del'd.

THE FORMAL BASES OF LAW. By Giorgio Del Vecchio. The Boston Book Co., 83-91 Francis St., Boston. 1914. pp. lvii, 412. $4.50.

BOYCOTTS AND THE LABOR STRUGGLE. By Henry R. Seager. John Lane Company, 116-120 West 32d St., New York. 1913. pp. 488. $2.00.

DIGEST OF THE LAW OF RESTRICTIONS ON THE USE OF REAL PROPERTY. By C. P. Berry. Geo. I. Jones, 202 S. Clark St., Chicago. 1915. pp. xlv, 657. $6.50 del'd.

GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914. By James Q. Dealey. Ginn & Co., 29 Beacon St., Boston. 1915. pp. viii, 308. $1.40.

ETHICS OF THE LEGAL PROFESSION. By Orrin N. Carter. Northwestern University Press, Northwestern University Building, Chicago. 1915. pp. xxiv, 116. $1.50.

THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS. By Harvey C. Voorhees. Second edition. Little, Brown & Co., 34 Beacon St., Boston. 1915. pp. xliii, 287. $3.00 net.

UNITED STATES MINING STATUTES ANNOTATED, BULLETIN NINETY-FOUR, OF THE UNITED STATES BUREAU OF MINES. Part I. Sections and Statutes Relating to Metalliferous and Coal Mining. Part II. Miscellaneous Mining Subjects. By J. W. Thompson. Washington Government Printing Office. 1915. pp. Vol. I, xxxv, 1772. Vol. II, xxix, 860. $2.50.

24120
11-27-29

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google